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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 182

RETAIL CLERKS INTERNATIONAL ASSOCIATION and RETAIL CLERKS UNION, LOCAL 648, JAMES A. SUFFRIDGE, A. B. CROSSLER and C. H. JINKERSON,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Subject Index

	Page
Prayer	2
Opinions below	2
Jurisdiction	2
Question presented	3
Statute involved	3
Statement	3
Specifications of error	9
Reasons for allowance of writ	10
1. The decision below raises novel and important questions concerning the interpretation and application of the National Labor Relations Act, as amended. Such questions have not been but should be settled by this court	10
2. The decision is in error and is in probable conflict with decisions of this court and decisions of Courts of Appeal in other circuits	15
3. The court below further erred in denying, without consideration of its merits, petitioners' motion for modification of the consent decree to conform to law	20
Conclusion	21

Table of Authorities Cited

Cases	Pages
Allis Chalmers Mfg. Co. v. N.L.R.B., Cir. 7, May 21, 1954, ... F.(2d) ...., C.C.H., 25 Labor Cases, par. 68,405....	17
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697.....	21
Eastern Coal Corp. v. N.L.R.B., Cir. 4, 1949, 176 F.(2d) 131	13
Fleming v. Huebsch Laundry Corp., 7 Cir., 1947, 159 F.(2d) 581	20
H. J. Heinz Co. v. N.L.R.B., 1941, 311 U.S. 514.....	11
Inland Steel Co. v. N.L.R.B., 1948, 170 F.(2d) 247, cert. denied 336 U.S. 960.....	17
Jackson Daily News, 90 N.L.R.B. 565.....	14
N.L.R.B. v. American National Insurance Co., May 26, 1952, 343 U.S. 395.....12, 14, 17, 18	
N.L.R.B. v. Berkeley Machine Works and Foundry Co., Inc., Cir. 4, 1951, 189 F.(2d) 904.....	17
N.L.R.B. v. Block Clawson Co., Cir. 6, 1954, 210 F.(2d) 523	17
N.L.R.B. v. Cheney California Lumber Co., 327 U.S. 385....	21
N.L.R.B. v. Edward G. Budd Mfg. Co., Cir. 6, 1948, 169 F. (2d) 571, cert. denied 335 U.S. 908.....	13
N.L.R.B. v. General Motors Corp., Cir. 2, 1950, 179 F.(2d) 221	17
N.L.R.B. v. J. H. Allison & Co., 1948, 165 F.(2d) 766, cert. denied 335 U.S. 814.....	17
N.L.R.B. v. Jones & Laughlin Steel Corp., 1937, 301 U.S. 1.	19
N.L.R.B. v. Leland-Gifford Co., Cir. 1, 1952, 200 F.(2d) 620	13
N.L.R.B. v. National Maritime Union, Cir. 2, 1949, 175 F. (2d) 686	18
N.L.R.B. v. Niles-Bement-Pond Co., Cir. 2, 1952, 199 F.(2d) 713	17
N.L.R.B. v. Red Spot Electric Co., Cir. 9, 1951, 191 F.(2d) 697	21
N.L.R.B. v. Tallega Cotton Mills, Cir. 5, May 20, 1954, ... F.(2d) ...., C.C.H., 25 Labor Cases, par. 68,408...	13
N.L.R.B. v. Weirton Steel Co., Cir. 3, 146 F.(2d) 144.....	15
N.L.R.B. v. Whittier Mills Co., Cir. 5, 1941, 123 F.(2d) 725	19

Pages

O. A. Schulte, Inc. v. Gaugi, 328 U.S. 108 21
Ohio Power Co. v. N.L.R.B., Cir. 6, 1949, 176 F.(2d) 385 ... 13
Order of Railroad Telegraphers v. Railway Express Agency, Inc., 1944, 321 U.S. 342 11

Terminal R. Assn. of St. Louis et al. v. U. S., 266 U.S. 17 .. 15
Texas Co. v. N.L.R.B., Cir. 9, 1952, 198 F.(2d) 540 13

United States v. Swift & Co., 286 U.S. 106 20

West Texas Utilities Co., Inc., 94 N.L.R.B. 1638 14

Rules

28 U.S.C., Rule 60 20

Statutes

61 Stat. 136 (1947):
Section 2(3) 3
Section 2(11) 3, 5, 11
Section 8(b)(3) 3, 4
Section 8(d) 3, 11, 18
Section 9(a) 3, 11
Section 14(a) 3

28 U.S.C. 1254(1) 2

29 U.S.C. (Supp.), Section 160(e) 2

Miscellaneous

Report of Emergency Board (No. 106) to President, May 15, 1954, National Mediation Board Case A-4336 14

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No.

RETAIL CLERKS INTERNATIONAL ASSOCIATION and RETAIL CLERKS UNION, LOCAL 648, JAMES A. SUFFRIDGE, A. B. CROSSLER and C. H. JINKERSON,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above cause April 2, 1954.

OPINIONS BELOW.

The Opinion on Rehearing of Pope, J., concurred in by Orr, J., and the dissenting opinion of Bone, J., handed down April 2, 1954 (Appendix A, p. 1) are reported in 211 F.(2d) 759. The opinion of Bone, J., for the Court of Appeals upon Petition of the National Labor Relations Board to Adjudge Respondents in Contempt, etc., handed down March 31, 1953 (Appendix A, p. 26) is reported in 203 F.(2d) 165. The Opinion of the Court on Remand dated January 2, 1951 (Appendix A, p. 40) is reported in 186 F.(2d) 371.

JURISDICTION.

The decree of the Court of Appeals after rehearing was dated and entered April 2, 1954 (Appendix A, p. 48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 29 U.S.C. (Supp.) Section 160(e).

QUESTION PRESENTED.

Is a demand by a union representing an appropriate unit of non-supervisory employees, made in the course of bargaining for such employees, that the agreement contain a clause that no supervisory employee shall perform work covered by the agreement unlawful under the National Labor Relations Act, as amended?

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (herein the "Act") are printed in Appendix B hereto, p. 50. The official citation to these statutory provisions is 61 Stat. 136 (1947); Section 2(3), Section 2(11), Section 8(b)(3), Section 8(d), Section 9(a), Section 14(a).

STATEMENT.

By its decree entered April 2, 1954 (Appendix A, p. 48) the Court of Appeals for the Ninth Circuit, one of the panel of three judges dissenting, adjudged petitioners in civil contempt for disobedience of a consent decree entered by the Court on January 14, 1950 (Ibid., p. 38) to enforce orders of the National Labor Relations Board (herein the "Board").

Petitioners are Retail Clerks' International Association, A.F.L. (herein "International"), Retail Clerks Union, Local 648, A.F.L. (herein "Local"), which is

an affiliate of International, and certain officials of those labor organizations (R. 181).[1]

Since before 1937 Local under its charter with International has represented the vast majority of persons handling and selling merchandise in retail food stores in San Francisco and Daly City (excluding meat department employees) and has regularly bargained collectively on their behalf with the operators of practically all such stores, including Safeway Stores, Incorporated (herein "Safeway"). Among the persons so represented by Local under its contracts were store managers (sometimes referred to as "location" managers) who also worked as clerks (R. 181-4).

In the summer of 1948, during negotiations for renewal of Safeway's collective bargaining agreement with Local, Safeway for the first time in twelve years of bargaining with Local sought to have its store managers excluded from the agreement (R. 728). Thereafter, on December 23, 1948, Safeway filed unfair labor practice charges with the Board (R. 6), and on December 31, 1948 the Board issued a complaint (R. 27) alleging that Local and International had refused to bargain collectively with Safeway in violation of Section 8(b)(3) of the Act, by insisting as a condition to bargaining for the nonsupervisory employees that Safeway "bargain collectively for" the store managers.

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[1]Petitioners' answer (R. 174) and affidavit of C. H. Jinkerson attached, filed June 15, 1950 (R. 180).

After the hearing on the complaint had begun a settlement was negotiated by and between Local, International, Safeway and General Counsel for the Board. This settlement was evidenced by a stipulation between the parties dated September 29, 1949 (R. 36). On November 3, 1949 the Board issued an order (R. 71) based upon this stipulation. The Court of Appeals on January 14, 1950 entered a consent decree enforcing the Board's order (R. 91; Appendix A, p. 38).

The relevant portions of the stipulation, Board order and consent decree are identical and read that International and Local:

> "Shall not: * * *
>
> "(b) Refuse to bargain collectively with Safeway for the employees in the unit described in paragraph IV of the Stipulation by insisting or demanding as a condition to such bargaining that Safeway bargain collectively for supervisory employees of Safeway within the meaning of Section 2(11) of the Act;"

Prior to signing the stipulation Local had, on September 8, 1949, proposed in writing that Safeway bargain with it for two separate agreements, one covering managers, the other clerks (R. 187). After the stipulation and Board order it became clear during negotiations between the parties in late November and during December, 1949, that Safeway was irrevocably committed to a policy of depriving its store managers of collective bargaining representation. Thereupon Local offered to relinquish completely the

demand that the managers be covered by a contract between Local and Safeway. Local declined, however, to relinquish also its right to protect the work or the job conditions of the non-supervisory clerks under such a contract against encroachment by the managers and other supervisors, and proposed specific provisions to achieve that result which Safeway rejected (R. 202-206). To secure a clerk's contract containing such job protections, Safeway's clerks went on strike January 16, 1950, and remained on strike until July 24, 1950 (R. 188-193).

Shortly after the strike began, in an effort to avoid confusion and to clarify its position, Local made the following proposal in writing concerning the principal issue in dispute:

> "The employer agrees that no location manager or any person deemed to be a supervisor shall perform work covered by this contract."[2]

At the same time Local offered to bargain with Safeway as to this and its other proposals, but received no reply from Safeway and no such bargaining ensued.

Nevertheless, the Board, on May 19, 1950, filed with the Court of Appeals its petition for a rule to show cause why petitioners should not be adjudged in civil contempt, with supporting affidavits, alleging that petitioners had violated the decree by making the above referred to demands in bargaining with Safe-

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[2]Paragraph numbered (2) of Exhibit 5 to affidavit of Herman F. Weber attached to Board's petition to adjudge in contempt filed May 19, 1950 (R. 157).

way (R. 103). An order to show cause issued on the same date (R. 172) and petitioners on June 15, 1950 filed an answer (R. 174) with supporting affidavits, together with a motion to dismiss the Board's petition to adjudge in contempt (R. 341) and a motion to modify the consent decree to conform to law (R. 374). The Board, on June 19, 1950, filed a motion for summary entry of judgment (R. 394) and the parties were heard on the issues raised by these pleadings by a three-judge panel of the Court of Appeals on June 20, 1950.

On July 24, 1950, Local, International and Safeway terminated the strike by a settlement agreement (R. 419). This agreement made the final decision of the Court of Appeals or of this Court in the present litigation as to the legality of petitioners' "clerks' work" demand (quoted above, p. 6) as a legitimate "subject of collective bargaining under applicable law", the basis for the future bargaining relations between Safeway and Local (R. 419-20). The settlement agreement of July 24, 1950 also provided, that upon confirmation by such final decision of the legality of petitioners' "clerks' work" demand the parties would negotiate and agree upon a clause to be inserted in the clerks' contract defining what was to be included and what excluded from the term "clerks' work" (R. 420-21).

Subsequently on January 2, 1951, the Court of Appeals acted in the contempt proceedings pending before it by remanding the cause to the Board to permit it to take testimony and make findings on the single

question of whether Safeway's managers were supervisors within Section 2(11) of the Act and, should it do so, to supplement its order and petition the Court for a further decree of enforcement (Appendix A, p. 40).

Thereafter, the Board reopened the record and appointed a Trial Examiner to hold hearings. On October 1, 1951 the Board issued a supplemental decision and amended order, approving the report of its Trial Examiner finding that Safeway's location managers were supervisory employees within the Act and amending its order to read accordingly (R. 484).

On October 2, 1951 the Board petitioned the Court of Appeals to amend its consent decree of January 14, 1950 in conformity with the Board's amended order (R. 532), gave notice of motion for summary entry of an amended decree (R. 531) and simultaneously moved the Court for discontinuance of the contempt proceedings (R. 528).

Petitioners thereupon renewed their prior motions to dismiss the petition to adjudge them in contempt and to vacate the order to show cause, as well as their prior motion to modify the consent decree of January 14, 1950 to conform to law (R. 551).

On March 31, 1953, notwithstanding the Board's motion to dismiss the contempt proceedings, the Court entered a decree (Appendix A, p. 43) which adjudged petitioners in contempt for violation of the consent decree of January 14, 1950, and in the accompanying opinion by Judge Bone the Court denied the petition

of the Board for enforcement of its amended order and entry of an amended decree and denied petitioners' various motions (Ibid., p. 37).

On June 1, 1953 petitioners filed with the Court of Appeals a petition for rehearing (R. 616), which was granted by an order entered August 13, 1953 (Appendix A, p. 46). Thereafter, on April 2, 1954, the Court of Appeals entered its final decree and decision (Ibid., p. 48), Judge Bone of the same three-judge panel dissenting, adjudging petitioners in civil contempt for the reasons stated in the accompanying opinion of Judge Pope, concurred in by Judge Orr (Ibid., p. 1). Judge Bone at the same time filed a dissenting opinion (Ibid., p. 12). In substance the majority held that the National Labor Relations Act, as amended, required that the consent decree be construed to forbid the particular demand in question.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

1. In holding that the demands made by petitioners in bargaining with Safeway for its non-supervisory employees (clerks) were unlawful and constituted bargaining with Safeway for its supervisors (location managers) and, therefore, violated the consent decree.

2. In denying petitioners' motion to conform the consent decree to law.

REASONS FOR ALLOWANCE OF WRIT.

1. THE DECISION BELOW RAISES NOVEL AND IMPORTANT QUESTIONS CONCERNING THE INTERPRETATION AND APPLICATION OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED. SUCH QUESTIONS HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

From the very beginning of the organized labor movement in the United States, unions have bargained for and sought to protect the work of their members. This bargaining has customarily and traditionally included insistence upon provisions designed to secure that work against encroachments by others such as foremen and similar supervisory personnel (Appendix C hereto, pp. 56-76). The majority judges in their decision below held that the amendments to the Act relating to supervisory employees (61 Stat. 136; Appendix B, pp. 50-52) had the objective of prohibiting unions representing non-supervisory employees from any longer making collective bargaining demands of this kind, because such demands affect the work or other employment conditions of supervisors. Having so decided the effect of the law, the majority judges below ruled that they were obliged to construe and enforce the consent decree accordingly. The question thus presented is whether the Act as amended makes such historical collective bargaining unlawful and whether such demands must now be proscribed.

The importance of the question is manifest. It is not an overstatement to assert that every labor union has at one time or another bargained on such subjects and that the great majority of them now have collective bargaining contracts containing clauses re-

specting the work of their members. See authorities quoted in Appendix C hereto. It is likewise plain from these authorities that such clauses inevitably affect or restrict in varying degrees the freedom of supervisors to engage in the same kind of work as the rank-and-file. As one authority has stated:

> "In all industries unions have succeeded in affecting the job content of foremen and first line supervisors by agreements forbidding their engaging in production operations except in specified situations." (Appendix C, p. 56.)

All of these unions in all industries and their bargaining rights are, therefore, vitally affected by the questions raised by the decision below.

The question presented thus concerns the basic right of unions and their non-supervisory members to continue to bargain under law in accordance with their custom and practice in the history of trade union movement in the United States. This Court has decided that such lawful collective bargaining customs and practices constitute "conditions of employment" and are embraced within the statutory concept of collective bargaining as used in the Act (Sections 8(d) and 9(a); Appendix B, pp. 51-52). *H. J. Heinz Co. v. N.L.R.B.*, 1941, 311 U.S. 514, 523-526; *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 1944, 321 U.S. 342, 346.

Since the 1947 amendments to the Act, this Court has again upheld the proposition that the Act reaffirms and gives statutory approval to "the philosophy

of bargaining as worked out in the labor movement in the United States." *N.L.R.B. v. American National Insurance Co.,* decided May 26, 1952, 343 U.S. 395. In that case this Court quoted with approval its prior rulings in holding that the Court of Appeals for the Fifth Circuit had properly denied enforcement of a Board order prohibiting an employer from bargaining for a management functions clause concerning conditions of employment. In so holding this Court found such clauses to be a common collective bargaining practice and that as such they were legitimate and lawful subjects of bargaining under the amended Act. The precise question here presented is whether petitioners' demands, which are established as an even more common collective bargaining practice, are made unlawful by the amendments to the Act pertaining to supervisory employees.

The lower court majority misapprehended the question by giving its attention to the effect of the amendments to the Act upon the rights of *supervisors* rather than to what, if any, effect these amendments have upon the rights of *non-supervisory* employees and their unions with respect to traditional subjects of bargaining. Neither in the Act itself (Appendix B, p. 50), the excerpts from the legislative history quoted by the majority judges below (Appendix A, pp. 8-10) nor elsewhere in the committee reports is there any evidence that Congress sought to limit the rights of unions of non-supervisory employees to pursue such traditional collective bargaining practices as are

here in question. The only legislative history directly on the subject indicates the exact opposite, namely, an intent to protect the rank-and-file against supervisors (Appendix A, p. 53). All of the decisions construing these provisions of the amended Act are consistent with this view.[3]

Following Safeway's refusal to bargain with petitioners for its managers (Statement, supra, p. 5), petitioners in bargaining for the clerks faced an entirely new situation fraught with disadvantages and complications which had never existed before. Managers had always done a considerable amount of clerks' work. There was no assurance they would not be given more by management when not covered by a union agreement. In the absence of an agreement providing, as had those previously in effect (R. 139-142), for such things as night shift premiums and a prohibition against overtime work, it was reasonable to suppose that Safeway might well find it expedient to work its managers different and longer hours than the clerks. Nor is it unheard-of for employers to attempt to create additional "supervisory" jobs so as

[3]See *N.L.R.B. v. Tallega Cotton Mills*, 5 Cir., May 20, 1954, ___ F.(2d) ___, C.C.H., 25 Labor Cases, ¶ 68,408, holding that "• • • the amended Act did not diminish the protection previously accorded ordinary employees • • •"; *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 6 Cir., 1948, 169 F.(2d) 571 (cert. den. 335 U.S. 908); *Texas Co. v. N.L.R.B.*, 9 Cir., 1952, 198 F.(2d) 540; *Eastern Coal Corp. v. N.L.R.B*, 4 Cir., 1949, 176 F.(2d) 131; *Ohio Power Co. v. N.L.R.B.*, 6 Cir., 1949, 176 F.(2d) 385, holding that Section 2(11) of the Act is unambiguous and does not require resort to its legislative history for proper application; *N.L.R.B. v. Leland-Gifford Co.*, 1 Cir., 1952, 200 F.(2d) 620.

to place more of their employees outside the bargaining unit and beyond the protection of the Act (see *West Texas Utilities Co., Inc.,* 94 N.L.R.B. 1638; *Jackson Daily News,* 90 N.L.R.B. 565). These were some of the new problems which arose to confront petitioners and prompted them in good faith to make the demands they made when they bargained with Safeway solely for the clerks.

The plain object of petitioners' key demand was to reserve to the clerks the work to be covered by contract and to protect the job opportunities and labor standards of the clerks from the unfair competition of employees outside the bargaining unit. No purpose could be more fundamental or important to organized labor and its members. Indeed, as a President's Emergency Board under the Railway Labor Act very recently concluded, the denial of such protections "strikes at the very foundation of collective bargaining agreements" between employers and their non-supervisory employees.[4]

Neither the Act, this Court's decisions nor the terms of the decree permitted the Court below to forbid such good faith conduct on the part of the petitioners (*N.L.R.B. v. American National Insurance Co.,* supra). Having decreed such conduct unlawful, the decision below has thus raised a novel and fundamental question concerning the interpretation and

[4]See Report of Emergency Board (No. 106) to President, dated May 15, 1954, in National Mediation Board Case A-4336, Appendix C, p. 75.

application of the amended Act in respect to traditional and important bargaining practices of American trade unions which clearly calls for solution through a review by this Court.

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2. THE DECISION IS IN ERROR AND IS IN PROBABLE CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS OF COURTS OF APPEAL IN OTHER CIRCUITS.

Ignoring the evidence, the well established rules governing civil contempt proceedings,[5] the authorities before it (R. 658-664; 716-724) and the decisions of this Court approving the acceptance of historical practices in the United States as within the meaning of collective bargaining under law, the opinion of the judges in the majority below expounds instead their unsupported personal views regarding the substantive merits of petitioners' proposals. In sum, these were that,

> "It is but common knowledge that what is proposed here is no way to run a grocery store,"

that the demand was "a most inefficient system for limiting" the manager's duties, thus creating "enforced idleness," and that

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[5]See *N.L.R.B. v. Weirton Steel Co.*, 3 Cir., 146 F.(2d) 144, 145, holding that in proceedings for summary judgment on the pleadings all reasonable inferences and intendments from the admitted facts must *as a matter of law* be taken against the movant and in favor of the opponent. See, also, this Court's holding in *Terminal R. Assn. of St. Louis et al. v. U. S.*, 266 U.S. 17, 29.

> "The whole proposal seems so impracticable and so unreasonable that it demonstrates a refusal to conform to the provisions of the consent decree."

And in conclusion, these judges stated:

> "It is apparent that a union acting in the interests of its own members could undertake to meddle in matters properly belonging to management in a multitude of ways; but the fact that the union is doing so in its own interest does not excuse it from a charge of refusal to bargain in good faith or a charge of violation of a decree of this character."
>
> (Appendix A, pp. 11-12).

The Court below has thus erroneously construed the law, and applied its consent decree accordingly, so as to empower it to exclude from collective bargaining proposals concerning a common collective bargaining practice, so as to empower it to compel petitioning unions to make concessions in collective bargaining to Safeway, the employer, and so as to empower the Court to sit in judgment on the substantive terms of a collective bargaining agreement between said parties. The assumption of these powers by the Court below, we respectfully submit, is not a proper exercise of that Court's authority under the Act as it has been construed in the decisions of this Court and the other Courts of Appeal and is, in fact, in sharp conflict with the interpretive principles established in those decisions.

Most notably, it is in conflict with this Court's decision in *N.L.R.B. v. American National Insurance Co.*, discussed under Point 1, supra, pp. 11-12.

The decision of the majority judges below is also at variance with decisions of the Courts of Appeal of other circuits. We refer to the cases in which an employer has refused to bargain over an issue upon the erroneous theory that as a matter of law the issue did not involve a bargainable "condition of employment" within the scope of the employer's duty to bargain under the Act. Such a contention was rejected by the Court of Appeals for the Seventh Circuit in *Inland Steel Co. v. N.L.R.B.*, 1948, 170 F.(2d) 247, cert. denied 336 U.S. 960 (pensions); and again by the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. J. H. Allison & Co.*, 1948, 165 F.(2d) 766, cert. denied 335 U.S. 814 (merit increase).[6] It is true that here the petitioning unions, rather than Safeway, the employer, have been charged with refusal to bargain; but the result cannot be different because the situation of the parties to the bargaining is reversed. In either case the basic issue is whether petitioners'

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[6]See also to the same effect:
N.L.R.B. v. General Motors Corp. (2 Cir., 1950), 179 F.(2d) 221 (group insurance); *N.L.R.B. v. Niles Bement-Pond Co.* (2 Cir., 1952), 199 F.(2d) 713 (Christmas bonus); *N.L.R.B. v. Berkeley Machine Works and Foundry Co., Inc.* (4 Cir., 1951), 189 F.(2d) 904 (merit increases); *N.L.R.B. v. Block Clawson Co.* (6 Cir., 1954), 210 F.(2d) 523 (profit sharing plan); see also: *Allis Chalmers Mfg. Co. v. N.L.R.B.* (Cir. 7, May 21, 1954), ... F. (2d) ....., C.C.H., 25 Labor Cases, ¶ 68,405.

demands fall within the concept of collective bargaining approved by the Act.[7]

The Act, as amended in 1947, is explicit in depriving the Board and the Courts of authority to indulge in their own appraisal of the fairness or feasibility of bargaining proposals so as to require one party to make concessions to the other, as was done by the Court below in this case. Section 8(d), which was added by these amendments (Appendix B, p. 51), contains the express provision that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." Speaking of the purposes of the Act in general and this provision in particular, this Court said in the *American National Insurance Co.* case, supra, that the Act "is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers," but "does not compel any agreement whatsoever between employees and employers," nor "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement" (343 U.S. 401-2), and that it is now apparent from the statute itself that

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[7]None of petitioners' proposals call for an illegal contract term. Consequently, cases such as *N.L.R.B. v. National Maritime Union*, 2 Cir., 1949, 175 F.(2d) 686, in which the demands of a union were found to violate specific provisions of the Act, are wholly irrelevant. Apart from such cases we know of none in which demands shown to be consistent with traditional collective bargaining practices have ever been proscribed as beyond the scope of permissible bargaining under the Act. The decision below, therefore, stands alone and in conflict with all of the authorities.

> *"the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements"* (Ibid. 404; italics added).

It goes without saying that a Court empowered by the Act to enforce the Board's orders, as was the Court below, may no more transgress these statutory limitations than the Board itself.

The authoritative construction of the Act as it was originally enacted and without the 1947 amendments has consistently been to the same effect (see *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 45). To quote but one of the many decisions passing on the question, the Court of Appeals for the Fifth Circuit, in holding that an employer had not violated a decree requiring it to bargain in good faith, had this to say:

> "The law requires good faith bargaining with the purpose of reaching an agreement. It does not require that any particular form of agreement be reached. The respondents did not ask a single thing of the union that it could not, if it wanted to, have agreed to * * *. *It is not for us to determine whether the proposals of the union or those of the respondents would have been best for employer and employee.* It is sufficient for us to determine that respondents have not, in contempt of this court's order, failed and refused to bargain." *N.L.R.B. v. Whittier Mills Co.*, 5 Cir., 1941, 123 F.(2d) 725, 728. (Italics added).

We submit that the rulings of the majority judges below in deciding that petitioners' demands are not

bargainable issues but matters "belonging to management," in sitting in judgment on their merits and in compelling petitioners to make concessions to the employer by withdrawing their demands upon pain of punishment for contempt, are erroneous and so contrary to the whole course of decision in construing and applying the Act as to clearly warrant granting the review sought by this petition.

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3. THE COURT BELOW FURTHER ERRED IN DENYING, WITHOUT CONSIDERATION OF ITS MERITS, PETITIONERS' MOTION FOR MODIFICATION OF THE CONSENT DECREE TO CONFORM TO LAW.

The consent decree and the Board's order upon which it was based have been misconstrued and misapplied so as to deprive petitioners of important rights guaranteed by the Act and the Federal Constitution. If the language of the decree is capable of such misinterpretation, it should be clarified so as to remove all doubt that it can have no greater force or effect than the law under which it is issued.

The decision below is based upon an erroneous view of the law regarding the power of the Court to modify its consent decree and the rights of petitioners as aggrieved parties to have such power exercised in their behalf. The Court below had authority to grant such a motion and the duty to inquire into its merits (28 U.S.C. Rule 60; *U.S. v. Swift & Co.*, 286 U.S. 106, 114-115; *Fleming v. Huebsch Laundry Corp.*, 7 Cir., 1947, 159 F.(2d) 581). And it is well settled that in

enforcing an order of the Board the Courts will examine the order to determine whether enforcement is consistent with the Act, even though no party to the proceeding has urged such an objection (*N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 390; *N.L.R.B. v. Red Spot Electric Co.*, 9 Cir., 1951, 191 F.(2d) 697). Moreover, in the enforcement of statutes which vindicate an important public policy, a right conferred upon a party affecting the public interest may not be waived if the waiver would contravene the statutory policy (*Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705; *O. A. Schulte, Inc. v. Gaugi*, 328 U.S. 108, 113). Thus the circumstance that petitioners originally consented to the Board's order and the decree is irrelevant if it is shown that they both exceeded the authority conferred by the statute.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated, July 1, 1954.

Respectfully submitted,

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(Appendices A, B and C Follow.)

Index to Appendices

Pages

APPENDIX A—Opinions, Decrees and Orders of Court Below 1–49

Opinions of Court Below:

Opinion on Rehearing of Pope, J., Concurred in by Orr, J., and Dissenting Opinion of Bone, J., filed April 2, 1954, 211 F.(2d) 759 (R. 728)..... 1–25

Opinion for the Court of Bone, J., upon Petition to Adjudge Petitioners in Contempt, filed March 31, 1953, 203 F.(2d) 165 (R. 539).....26–37

Decrees and Orders of Court Below:

Consent Decree entered January 11, 1950 (R. 91)..38–39

Order Remanding Cause for Further Proceedings entered January 2, 1951, 186 F.(2d) 371 (R. 430) 40–42

Decree Adjudging Petitioners in Contempt, entered March 31, 1953 (R. 548) 43–45

Order Granting Rehearing, entered August 13, 1953 (R. 726) 46–47

Decree after Rehearing Adjudging Petitioners in Contempt, entered April 2, 1954 (R. 745).....48–49

APPENDIX B—Pertinent Statutes 50–55

Sections 2(3), 2(11), 8(b)(3), 8(d), 9(a) and 14(a) of National Labor Relations Act, as amended.....50–51

Legislative History of Labor-Management Relations Act of 1947—Excerpts from Reports of Committees of House and Senate. 53–55

APPENDIX C—Authorities Evidencing Historical Collective Bargaining Practices in United States Relating to Protection of Work of Employees in Bargaining Unit Against Supervisory Employees.....56–77

Clauses Restricting Work of Supervisors.....56–70

Pages

(1) Authoritative Textbooks 56–58

(2) Standard Works Collecting and Analyzing Typical Contract Provisions 58–67

Bureau of Labor Statistics, United States Department of Labor, Bulletin No. 686, 1942... 58

Commerce Clearing House, *Labor Law Reports* 58–62

Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*.....62–67

(3) National War Labor Board Decisions.....67–68

(4) Private Arbitration Awards 68–70

Clauses Relating to Promotions and Demotions from Supervisory Positions 70–73

Clauses Governing Hours and Overtime Pay of Supervisors 73–75

Report of Emergency Board (No. 106) to President in National Mediation Board Case A-4336, dated May 15, 1954 75–76

Appendix A

[211 F.(2d) 759] (R. 728)

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Retail Clerks International Association, A.F.L., Retail Clerks Union, Local 648, et al., Respondents.	No. 12,434 Apr. 2, 1954

ON REHEARING

Before BONE, ORR and POPE, Circuit Judges.

POPE, Circuit Judge.

Respondents are Retail Clerks International Association, AFL (herein "International"), Retail Clerks' Union Local 648, AFL (herein "Local"), which is an affiliate of International, and certain officials of those labor organizations. From 1937 until 1948 Local held collective bargaining contracts with Safeway and most of the other retail grocery store operators in San Francisco County. Local represented and its contracts covered all the employees in these stores with the exception of butchers. In the summer of 1948, during the course of negotiations with Local for renewal of

the existing bargaining agreement, Safeway for the first time sought to have its "location managers" excluded from the coverage of the new agreement. There was one location manager in charge of each of Safeway's stores. He was the sole representative of management in the store and as such had supervisory powers and duties, but he also performed, along with the rank and file food clerks (herein "clerks"), many non-supervisory tasks as a routine part of his work day.

When Local refused to assent to the exclusion of location managers from the new collective bargaining agreement, Safeway on December 31, 1948, filed unfair labor practice charges with the National Labor Relations Board against Local and International. The Board issued a complaint charging Local and International with refusing to bargain collectively, in violation of §8(b)(3) of the National Labor Relations Act, as amended.[1] On September 29, 1949, after the hearing on the complaint had begun, a settlement was negotiated by and between Local, International, Safeway, and General Counsel for the Board.[2] As a part

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[1]§8(b)(3) of the Act reads as follows: "(b) It shall be an unfair labor practice for a labor organization or its agents——

• • •

"(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);".

[2]The Board proceeding involved several other local retail clerks' unions in northern California, who were also parties to the settlement. The other unions are not, however, involved in this contempt proceeding.

of this settlement the parties entered into a stipulation which, so far as here material, provided as follows:

> "All employees in the grocery departments of the 71 Safeway Stores in San Francisco County, excluding location managers and any other supervisory employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Said employees are, and have been since before 1948, represented exclusively for collective bargaining by Respondent International and its agent, Respondent Local, both of whom are labor organizations within the meaning of Section 2(5) of the Act."

As a part of the same settlement the Board issued an order, with the consent of all parties, which provided in pertinent part as follows:

> "Retail Clerks International Association, AFL, and Retail Clerks Union Local 648
>
> 1. Shall not:
>
> * * * * * * *
>
> (b) Refuse to bargain collectively with Safeway for the employees in the unit described in paragraph IV of the stipulation [above quoted] by insisting or demanding as a condition to such bargaining that Safeway bargain collectively for supervisory employees within the meaning of Section 2(11) of the Act."

The Board subsequently petitioned for enforcement of its order and on January 14, 1950 this court, with the consent of International and Local, entered an enforcement decree.

Thereafter and on May 19, 1950 the Board petitioned this court to adjudge respondents in civil contempt on the ground that they had refused to bargain for clerks by demanding as a condition to such bargaining that Safeway bargain collectively for its location managers. After our remand of the cause to the Board for findings on the question whether location managers were "supervisory employees" within the meaning of the Act (see 186 F. 2d 371), the case was returned to this court in October of 1952. Thereafter (on March 31, 1953), we handed down our opinion and entered a decree on the same date holding respondents in contempt. See 203 F. 2d 165. We granted a rehearing, limited to the questions which are here discussed.[3] In our previous opinion we disposed of certain procedural problems which had arisen and we also sustained the Board's finding that location managers are "supervisory employees" within the meaning of the Act. Those questions will not be reconsidered in this opinion.

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[3] "The rehearing shall be limited to the questions whether the following demands, made by respondents subsequent to the enforcement decree of this Court of January 14, 1950, and in the course of negotiation for a bargaining contract covering the employees in the bargaining unit described in paragraph IV of the stipulation in case No. 20-CB-43, constitute violations of the said decree of this Court:

1. The demand that a no-strike clause be eliminated from the proposed bargaining contract.

2. The demand that no location manager shall perform the same work as that performed by the employees in the above stated bargaining unit, sometimes called 'clerks' work', under terms and conditions of employment less favorable than those provided in a bargaining contract covering those within the said unit; or, in the alternative, that no location manager shall perform 'clerks' work'.

3. The demand that location managers shall be selected from among the employees in the said bargaining unit."

Respondents made the following demands in the course of bargaining for a clerks' contract:

1. That the agreement, if it did not cover all employees who performed clerks' work, should not contain a no-strike clause, unless such a clause contained suitable guarantees protecting clerks from loss of work or "against encroachments and abuses of union conditions on the job;"

2. That the agreement contain a clause requiring Safeway to fill vacancies in location managers' positions from the ranks of the clerks;[4]

3. That the agreement contain a clause providing that no location manager or any other supervisor employee should perform clerks' work under terms and conditions of employment less favorable to the union than those provided in the clerks' contract; or, in the alternative,

4. That the agreement contain a clause providing that no location manager or any other supervisory employee should perform clerks' work.[5]

In our former opinion, (203 F. 2d at p. 169), we said: "There is no question that Local and Interna-

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[4]There was some argument between the parties on rehearing as to whether this demand was ever in fact made. The demand admitted by respondents was in these words: "In each grocery store or department there shall be one clerk designated as a manager." The Board and Safeway took the position that this required Safeway to select its managers from the ranks of clerks. In an affidavit filed herein, C. H. Jinkerson, Secretary-Treasurer of Local and one of the respondents, similarly interpreted this demand.

[5]On rehearing respondents argued that this fourth demand was put forth as a substitute for, and not as an alternative to, their third demand. We think the record shows that it was made as an alternative. The question cannot affect the decision in the case in any event.

tional did impose as a condition to their bargaining on behalf of clerks the bargaining by Safeway for location managers. Respondents have admitted to demanding freedom on the part of the clerks to strike if location managers are not provided for in the bargaining agreement; that persons doing the work of clerks (which would include location managers for part of their work day) should have the benefit of any collective bargaining agreement that should be entered into, or in the alternative that location managers should not do the work of clerks; and that location managers should be selected from among the clerks. And it is further admitted that respondents called a strike when its demands were not met. It will not do to say that the demands made were solely in the interests of the clerks in the appropriate bargaining unit. The effect of our decree was to prohibit all attempts of respondents to exact concessions from Safeway as to supervisory employees as the price of reaching an agreement as to the terms and conditions of employment of clerks. We think it too plain for argument that respondents' demands flew directly in the face of this prohibition." We think that what we there said was correct, and this for several reasons.

First of all, there is the plain language of the decree. By that decree it was directed that the respondent unions should not "refuse to bargain collectively with Safeway for the employees in the unit described . . . by insisting or demanding as a condition of such bargaining, that Safeway bargain collectively for supervisory employees. . . ." The position which the unions

have taken upon the rehearing of this matter discloses a misapprehension as to what the quoted paragraph says: The unions say in effect "Our demands do not constitute bargaining by us for location managers or any effort at such bargaining but they represent bargaining solely in the interest of the clerks." Indeed, they say, "we are not only willing but, frankly, somewhat eager to relinquish bargaining for Safeway location managers altogether and under all circumstances."

What the quoted paragraph says is plainly enough that the unions shall not when bargaining with Safeway as to the conditions of employment of the clerks demand that Safeway bargain for the conditions of employment of the location managers. In other words, the unions may bargain for the clerks but they cannot attach as a condition thereto that Safeway shall bargain for the supervisory employees.

The four demands of the unions above listed require Safeway to enter into certain bargains for the supervisory employees and relating to conditions of their employment. On the face of the decree such demands are in violation of the decree. They are demands covering a great range of the supervisors' employment and working conditions. They relate to who may be employed as supervisors; they relate to the conditions under which the supervisors shall work, and they relate to what work the supervisors may do. That is calling for bargaining by Safeway for its supervisory employees.

A second reason why we adhere to our first decision is that it interprets the Board's order in a manner calculated to effect the policies which Congress had in view in enacting the Act. Where possible the Board's order should always be so construed, for the Board, constituted for that very purpose, has presumably sought to accomplish those objectives. When the Act's objectives as respects supervisory employees are examined, particularly in the light of its legislative history, there can be no doubt at what the Board was aiming in the prosecution of its complaint against these unions and in the procuring of the Board's order and the court's decree. Both were phrased in the language of the complaint.

A primary objective of §2(11) of the Act, to which reference is made in this paragraph of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear.[6]

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[6] "Management, like labor, must have faithful agents.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.

* * *

"Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to

The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act. Much emphasis was laid upon the desirability of assuring their independence of unions of the rank-and-file. It was noted that what had been happening in respect to unionizing of foremen under the former Act was "bad for output" and hurt the free flow of commerce which the Act was intended to promote.[7] The committees noted the tendency to subservience by the foremen and their associations to unions of the rank-and-file, and how as a practical matter the rank-and-file unions were dictating what the foremen might or might not do.[8]

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take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security'. It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism. (J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, (1944).) It is wrong for the foreman, for it discourages the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, it is wrong for industry and particularly for the future strength and productivity of our country." House Report No. 245, on H.R. 3020, Legislative History of the Labor Management Relations Act, 1947, Vol. 1, p. 307.

[7] "If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then Congress must exclude foremen from the operation of the Labor Act . . . ." Legislative History, supra, p. 306.

[8] The House Report alluded to documentary evidence which showed "a subservience of the association to unions of the rank and file that is rare among unions." It stated: "The evidence shows that foremen's unions are, and must be, wholly dependent upon

The conduct of the unions here furnishes a fair illustration of the sort of thing Congress was trying to get away from when it made these amendments with respect to supervisors. It may fairly be said that an employer would be sharply restricted in his opportunity to obtain loyal and efficient supervisors if he is to be limited to selecting them from a rank-and-file union whose members, by habit and training, may have acquired an anti-employer bias. Here the union proposes to dictate, through its bargaining, what the supervisors may or may not do. Congress took note (see note 8, supra) of how some foremen had adopted a policy of refusing to enter and protect the struck plants of their employers. Here the prohibition against a supervisor doing clerk's work would, if enforced, serve to close a store up tight in case of a strike. Congress obviously did not contemplate that a union should be able to exercise that much power. In view of the legislative history of the present Act we must construe the consent decree as having been framed with a view to avoiding just this sort of encroachment upon the rights of an employer to select and control his supervisors and to obtain their loyalty and cooperation.

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rank-and-file unions and under constant obligations to them. . . . The [foremen's] association has adopted a formal 'policy' forbidding *its* members, when the rank-and-file unions strike, to enter the struck plants and protect and maintain them without the consent of the rank-and-file unions." Legislative History, supra, pp. 306, 307. The Senate Report stated: "Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled." Legislative History, supra, p. 410.

Finally, we cannot close our eyes to the realities of the food store business. It is but common knowledge that what is proposed here is no way to run a grocery store. We know judicially that in every store, large or small, all the clerks may be busy when another customer walks in. If at that moment the manager approaches the customer with an inquiry as to what the customer requires, has the manager performed clerk's work? No matter how many pages in the union's contract are filled with definitions of "clerk's work", in the practical operation of a grocery store there would be hourly occasions for dispute as to the meaning of the term, from what words the manager may address to a customer, to where he may stand, or what he may do in or about the merchandise.

Again, Safeway cannot operate its stores without regard to its competitors. If its competitors are permitted to operate their stores in the good old fashioned way, whereby the owner or his representative steps forward and waits on trade during busy periods, Safeway cannot without great loss to itself agree to the restrictions upon management here demanded. The record shows that many of its stores are relatively small with no more than three employees, one of whom is a butcher. The proposal is no more than a demand for a most inefficient system of limiting the manager to duties which he can probably perform in a couple of hours each day with enforced idleness for the remainder of the time. The whole proposal seems so impracticable and so unreasonable that it demon-

strates a refusal to conform to the provisions of the consent decree.

As we previously said, it will not do to say that the demands were made solely in the interests of the clerks. It is apparent that a union acting in the interests of its own members could undertake to meddle in matters properly belonging to management in a multitude of ways; but the fact that the union is doing so in its own interest does not excuse it from a charge of refusal to bargain in good faith or a charge of violation of a decree of this character.

We therefore hold respondents in civil contempt of this court. A decree will be entered adjudging respondents in contempt and allowing them 60 days in which to purge themselves of their contempt by making a satisfactory showing to this court that the demands which we have held to constitute a violation of the decree of this court of January 14, 1950, have been withdrawn. Upon receipt of such showing, or upon expiration of the time granted therefor, the court will enter such further order as may then be appropriate.

BONE, Circuit Judge, Dissenting.

I concur in the result reached in Judge Pope's opinion insofar as it holds respondents in contempt for making the third of the four demands listed in that opinion. I think that particular demand was that Safeway bargain "for" supervisory employees (within the meaning of our decree) and was therefore

violative of our decree. I have become convinced, however, that in our former opinion (203 F. 2d 165) we were wrong in holding respondents in contempt for making the other three demands set out in Judge Pope's opinion. In pointing up the differences between my present views and those of my associates I shall focus my attention on the last of respondents' four demands—the demand that location managers be prohibited from doing clerks' work. This demand has become the key item of dispute between respondents and Safeway.

The nub of our former opinion, still adhered to by my associates, was the following interpretation of our decree: "It will not do to say that the demands made were solely in the interests of the clerks in the appropriate bargaining unit. The effect of our decree was to prohibit all attempts of respondents to exact concessions from Safeway as to supervisory employees as the price of reaching an agreement as to the terms and conditions of employment of clerks." 203 F. 2d at 169.

Thus we read the decree's prohibition against demands that Safeway bargain "for" supervisory employees as forbidding demands that Safeway grant "concessions" as to such employees, and we examined respondents' demands to determine whether they *in any way affected* supervisors. If this is the meaning of the decree, then there is no doubt that respondents' "no-clerks'-work" demand, and their other demands as well, constitute contempt, as the majority now

holds. The demands quite clearly require "concessions" from Safeway as to location managers and "affect" such employees in some manner.

I now think this interpretation of our decree is erroneous and cannot be justified. A brief reference to the facts which gave rise to the entry of our decree will serve to point up the error. Both the decree and the order of the Board which it enforces were issued with the consent of respondents. The order of the Board was a part of a settlement of a 1949 dispute between Safeway and respondents. The dispute, in brief, was this: Safeway for the first time demanded that its location managers be separated from its clerks for collective bargaining purposes; respondents, on the other hand, insisted that location managers be included in the clerks' bargaining unit and covered by the clerks' bargaining contract, as had been the practice in prior years. The settlement of the dispute was a victory for Safeway: it was stipulated that clerks, and clerks only, constituted the appropriate bargaining unit, and the Board's order prohibited respondents from demanding, as a condition to bargaining for clerks, that Safeway bargain for managers. *The settlement, and the Board's order (now embodied in our consent decree) which was a part of that settlement, had but one purpose namely, to prevent respondents from bargaining jointly for both location managers and clerks, as had been the prior practice.*

Thus our decree cannot, consistently with its purpose, be interpreted so as to prohibit respondents from making good faith demands *in the interests of the clerks,* even though, as commonly occurs in collective bargaining for rank and file employees, such demands might occasionally touch upon the terms and conditions of employment of supervisory employees in some particulars. The decree, properly interpreted, in no way restricts respondents in their bargaining for clerks. Respondents are not required to scrutinize each contemplated clerks' contract demand to see if it in any way *affects* location managers, with punishment for contempt as a possible consequence if they do not. The decree's prohibition against demands that Safeway bargain "for" location managers extends only to demands that Safeway bargain *with respondents, as representatives of managers, in the interests of and for the benefit of managers.* What is prohibited by our decree are attempts of respondents to use their status as representatives of the clerks to force Safeway to accept demands pressed by them *for and on behalf of managers.*

This interpretation of our decree requires a quite different approach to the question whether in making the no-clerks'-work demand respondents were guilty of contempt. The question is not, as the majority would have it, whether that demand *affects* the terms and conditions of employment of managers in some manner. Rather, the question is whether the demand constitutes *bargaining for and on behalf of managers.*

I think it is quite clear that it does not. On the contrary, the demand on its face constitutes bargaining *for clerks* and *against managers*. Its objective is to take work from the managers and give it to the clerks. Such an objective is often sought in collective bargaining for rank and file employees. *All the parties agree* that it is very common for collective bargaining agreements covering rank and file employees to restrict the non-supervisory work of management personnel. Looking no further than the terms of such a demand, then, it would in no sense seem to be violative of our decree. Whether the demand was nonetheless bad because not made in good faith raises a wholly different question, which will be put off for the moment.

The majority seek to bolster their holding with the rule that our decree should be interpreted so as to effectuate the *policy* of the Act. Apparently this rule is extracted from our case of N.L.R.B. v. American P. & C. Corp., 9 Cir., 113 F. 2d 232, 234-5. A brief look at that case will reveal that it lays down no such broad rule as that here relied upon by the majority. What that case says, in effect, is that a decree should be interpreted harmoniously with the Act, a proposition with which I have no quarrel. That does not at all mean that this Court may range through the Act and its history, deduce the "policy" of the Act therefrom, and then read such policy into a decree so as to give it a very different and much broader meaning than it had when entered. It is probably true that the purpose of the Board in issuing the order enforced

by us was to serve the Act's purpose of assuring to employers the undivided loyalty of their supervisory personnel, but the order and our enforcement decree undertook to achieve that end in only one way, namely, by prohibiting respondents from attempting to *bargain jointly* for both location managers and clerks. The question whether respondents have done what *the decree* prohibits is the only proper subject of concern here. Moreover, I cannot see that the principle of "undivided loyalty" of supervisors is in any way served by holding respondents' no-clerks'-work demand violative of our decree. Indeed, it would seem that to prohibit location managers from doing clerks' work would tie them more closely to Safeway's management by eliminating that community of interest between these managers and the clerks which flows from doing the same kind of work.

There is next the question whether respondents in fact made the no-clerks'-work demand *in good faith* on behalf of the clerks, or whether they pressed it for the sole purpose of forcing Safeway to accept the alternative (which respondents have at all times kept open to Safeway) of bargaining with respondents *for* location managers. If the latter interpretation of respondents' conduct is correct, then they have indeed refused to "bargain collectively" for clerks, under the applicable "good faith" test of bargaining,[1]

[1]Section 8(d) of the Act reads as follows:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms

by demanding as a condition to such bargaining that Safeway bargain *for* location managers, in violation of our decree.

The question, then, is whether the making of the no-clerks'-work demand amounts to a refusal to bargain in good faith. Our authority under the Act to determine when a bargaining demand is proper, or what is a "proper" subject of bargaining, is very limited. We cannot compel respondents to "agree to a proposal or require the making of a concession." § 8(d) of the Act. We are not allowed to "sit in judgment upon the substantive terms of collective bargaining agreements." Labor Board v. American Ins. Co., 343 U.S. 395, 404. The Court of Appeals for the Fifth Circuit, in holding that an employer had not violated a decree requiring it to bargain in good faith, had this to say:

> "The law requires good faith bargaining with the purpose of reaching an agreement. It does not require that any particular form of agreement be reached. The respondents did not ask a single thing of the union that it could not, if it wanted to, have agreed to * * *. It is not for us to determine whether the proposals of the union or those of the respondents would have been best for employer and employee. It is sufficient for us to determine that respondents have not, in contempt of this court's order, failed and

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and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *".

refused to bargain." N.L.R.B. v. Whittier Mills Co., 5 Cir., 123 F. 2d 725, 728.

At the same time I recognize that an absence of good faith in bargaining may sometimes be shown by patently unreasonable demands as well as by other circumstances. See N.L.R.B. v. Dalton Telephone Co., 5 Cir., 187 F. 2d 811; N.L.R.B. v. George P. Pilling & Son Co., 3 Cir., 119 F. 2d 32, 38. If respondents' no-clerks'-work demand, viewed in its setting, was wholly unreasonable and unprecedented as a matter of collective bargaining practice generally, or if it was such that it could obviously never be accepted by Safeway, or if it clearly served no legitimate interest of the clerks, then I would agree with the majority that in pressing it respondents failed to bargain in good faith. But unless the demand can be said to have reached those extremes, it is not for this court to pass upon its merits or speculate about respondents' motives in pressing it.

I do not think the no-clerks'-work demand, tested by these standards, amounts to a refusal to bargain in good faith. In their opinion the majority completely overlook the change wrought in the bargaining relationships between respondents and Safeway by the Board's issuance of its order against respondents and our entry of a decree enforcing that order. The system of store operation described in Judge Pope's opinion existed at a time when all of Safeway's managers and clerks were represented by the same union, were in the same bargaining unit, and were covered by

the same bargaining agreement. In such circumstances there was no reason for respondents to concern themselves with the question whether location managers should or should not do clerks' work. So long as respondents bargained jointly for both managers and clerks, they were in a position to protect and further the interest of both.

The situation was quite different when respondents first made their no-clerks'-work demand of Safeway. At that time respondents were subject to our consent decree which required them to bargain separately for clerks without injecting demands on behalf of managers into such bargaining. While respondents represented a majority of Safeway's location managers at that time, there was no assurance that they would continue to do so. There are no unfair labor practices against supervisors. See §§2(3) and 14(a) of the Act; Texas Co. v. N.L.R.B., 9 Cir., 198 F. 2d 540. Safeway was free to discourage the union membership of its managers by such means as were available to employers before the passage of the Wagner Act. Moreover, Safeway could not be compelled by law to bargain with its managers and there were strong indications that Safeway was not inclined to do so except on its own terms.

How did all this affect clerks? Managers had always done a considerable amount of clerks' work. There was no assurance that they would not be given more of such work when not covered by a bargaining agreement. It is not unusual to work supervisors long

hours at a flat salary, and such a practice might well have proved profitable to Safeway. Nor is it unheard-of for employers to attempt to create additional "supervisory" jobs so as to place more of their employees outside the protection of the Act. See West Texas Utilities Co., Inc., 94 N.L.R.B. 1639; Jackson Daily News, 90 N.L.R.B. 568. In view of Safeway's very determined stand against bargaining *for* managers, there may have been a not unreasonable suspicion that Safeway was seeking more than the "undivided loyalty" of its managers. I do not presume to say what Safeway's intentions were; I am here concerned only with what respondents, as representatives of the clerks, might reasonably have anticipated. In sum, they might have apprehended that a substantial part of the work of clerks would be taken up by supervisory personnel not organized for collective bargaining purposes.

In this context I cannot see that it was unreasonable for respondents to seek to restrict the "clerks' work" of managers. As I have stated above, restrictions on the non-supervisory work of management personnel are commonly found in collective bargaining agreements covering rank and file employees in like circumstances all over the country. *The Board and Safeway concede this.* And the fact that such restriction is a common and traditional subject of collective bargaining is in itself a persuasive, if not conclusive argument that respondents' demand for such restriction is within the sphere of collective bargaining which the Act meant to leave free from intru-

sion by either the Board or the courts. Labor Board v. American Ins. Co., supra, 343 U.S. at 405-408. In the case just cited the Supreme Court said that "the term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.'" 343 U.S. at 408.

If by making the no-clerks'-work demand respondents were guilty of a refusal to bargain in good faith it must be because, in the particular circumstances of this case, the demand seeks to impose such an extreme burden on Safeway that respondents must know that Safeway not only will not, but cannot possibly accept it. The majority seem to take the view that the demand is of that character.

I am not convinced that what respondents seek would impose an impossible burden on Safeway. The majority say that to prohibit managers from doing clerks' work is "no way to run a grocery store," and that it would place Safeway at a severe competitive disadvantage. The argument seems to proceed on the premise that the only profitable way to run a grocery store is the way grocery stores have been run in the past, a proposition that is by no means a matter of "common knowledge."

I cannot agree with the view that the no-clerks'-work demand is "beyond all reason." This demand should be considered in light of a "bulletin" dated March 17, 1948, and issued to location managers by

Safeway's President, Lingan Warren. In that bulletin Mr. Warren stated: "A manager is not really managing unless he spends most of his time in planning the work, training and directing others in its accomplishment, and reviewing over-all operations to see that the desired results are obtained in the desired manner." He then lists a number of such supervisory functions and concludes: "It should not be too difficult to convince a location manager that he can't do a food clerk's work and these things too."

Having in mind this interesting pronouncement of Safeway's highest officer, I cannot subscribe to the view that the no-clerks'-work demand is "impossible." To take clerk's work away from the managers might cause difficulty, and perhaps considerable difficulty to Safeway, but the same is also true of many union demands on employers which are not, for that reason, held to amount to a refusal to bargain in good faith. Though protesting vigorously against the demand, even Safeway does not assert that acceptance of it would create a situation that could not be met.

Finally, the majority do not know and I do not know precisely *how far* respondents' no-clerks'-work demand seeks to restrict location managers in doing clerks' work. We do not know, for example, whether respondents would allow managers to do clerks' work when emergencies demanded it or to the extent necessary to demonstrate proper work methods to untrained clerks. Provisions for such eventualities are commonly found in bargaining contract clauses re-

stricting the non-supervisory work of management personnel. The term "clerks' work" as used in respondents' demand has never been defined. An agreement between respondents and Safeway, dated July 24, 1950, which is apparently still in effect, provides that if the no-clerks'-work demand is held valid by this Court, then the clerks' contract shall contain such a clause, and the parties "shall agree upon and include in said contract a definition of the term 'clerks' work' as used [t]herein." Precisely what work is or is not to be permitted location managers is, apparently, a question which has been reserved for the bargaining table, and properly so.

I think that by holding respondents' no-clerks'-work demand violative of our decree and ordering it withdrawn this Court invades the sphere reserved to the bargaining process. It may be, as Safeway seems to indicate, that to permit respondents to press this demand will force Safeway to return to bargaining jointly for managers and clerks, the practice which obtained before this long litigation was begun. It may be (although we cannot know) that Safeway will choose this as an alternative to accepting the no-clerks'-work demand. But that possibility should not affect our decision in the present posture of this case. It is not the province of this Court, as I see it, to insure that Safeway will have achieved its goal, but only to interpret and enforce our decree. That decree did not *guarantee* Safeway a clerks' contract negotiated on its own terms.

I see no point in prolonging this already lengthy opinion with a discussion of respondents' first and second demands. Suffice it to say that I think those demands, too, were legitimate bargaining demands on behalf of the clerks and were therefore not violative of our decree.

(Endorsed:) Opinion and Dissenting Opinion. Filed Apr. 2, 1954. Paul P. O'Brien, Clerk.

[203 F.(2d) 165] (R. 539)

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board,
Petitioner,

vs.

Retail Clerks International Association, A.F.L., Retail Clerks Union, Local 648, et al.,
Respondents.

No. 12,434
Mar. 31, 1953

Upon Petition of the National Labor Relations Board to adjudge respondents in contempt, etc.

Before: Bone, Orr and Pope, Circuit Judges.

Bone, Circuit Judge.

On January 14, 1950, this court entered a consent decree enforcing an order of the National Labor Relations Board directing, among other things, that Retail Clerks International Association, AFL (hereinafter called "International") and Retail Clerks Union, Local 648 (hereinafter called "Local") shall not "(b) Refuse to bargain collectively with Safeway [Stores, Incorporated] for the employees in the unit described in paragraph IV of the stipulation in case No. 20-CB-43 by insisting or demanding that Safeway bargain collectively for supervisory employees of Safeway within the meaning of Section 2(11) of the Act." The "employees in the unit described in paragraph IV" were "all employees in the grocery

departments of the 71 Safeway stores in San Francisco County, excluding location managers and other supervisory employees * * *." In the same proceeding this court entered consent decrees enforcing similar Board orders against several other Local Retail Clerks Unions affiliated with International.

Subsequently the Board filed a petition in this court to have International, Local, and certain named officials of those organizations adjudged in civil contempt for refusing to bargain collectively with Safeway except on the condition that Safeway would agree to bargain for "location managers" employed by Safeway.

The primary question in the contempt proceeding was whether location managers were supervisory employees within the meaning of the enforcement decree. While the stipulation above referred to reflected an agreement that, for the purpose of determining the appropriate bargaining unit location managers should be considered supervisory employees, such agreement was not carried into and made a part of the decree. The decree, therefore, while it prohibited demands that Safeway bargain for supervisory employees as a condition of respondents' bargaining for clerks, did not specifically proscribe demands that Safeway bargain *separately for location managers.* Thus the question arose whether, at the time of the alleged violations of this Court's decree, location managers were "supervisory employees" within the meaning of the decree.

Since the order of the Board and the enforcement decree of this court had been entered by consent, there

was nothing in the record and no findings of the Board to indicate whether location managers were supervisory employees within the meaning of the decree. This court was unwilling to resolve that question upon the basis of the affidavits submitted in the contempt proceeding. Accordingly, we returned the case to the Board to take testimony and make appropriate findings on this single question, prior to any further proceedings for enforcement. See our opinion 186 F. 2d 371.

The Board took the position that we had returned the case for further hearings with a view to clarification and modification of our decree. After a hearing with all parties represented the Trial Examiner issued an intermediate report in which he made a finding of fact that location managers were "supervisory employees" of Safeway within the meaning of § 2(11) of the National Labor Relations Act. No exceptions were taken to this finding of fact in the intermediate report. The Board adopted the findings of the Trial Examiner and issued an amended order specifically including "location managers" within the term "supervisory employees."[1]

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[1]The amended order reads as follows:

"• • • Retail Clerks International Association, A. F. of L., and Retail Clerks Union, Local 648:

"1. Shall not:

"(b) Refuse to bargain collectively with Safeway for the employees in the unit described in paragraph IV of the Stipulation in Case 20-CB-43 by insisting or demanding, as a condition to such bargaining, that Safeway bargain collectively for *location managers or other supervisory employees* of Safeway within the meaning of Section 2(11) of the Act." (Emphasis ours.)

At the said hearing the other local unions, which were respondents in the proceeding for enforcement of the Board's original order but not involved in the later contempt proceeding, stipulated that the evidence introduced was applicable to location managers employed by Safeway in each of their respective jurisdictions. No objection having been made to the finding that location managers were supervisory employees, the Board entered amended orders similar to that quoted above as to each of the locals involved in the original proceeding.

The Board now petitions this court for summary enforcement of its amended orders and for dismissal of the contempt proceedings. However, the Board contends that if enforcement of its amended orders is denied, then we should proceed to dispose of the contempt matter.

At the outset we must erase certain misunderstandings arising out of our return of the case to the Board for further proceedings. In taking this action we merely gave leave to take testimony and make findings on the primary and controlling fact issue raised on the contempt proceeding. We did not contemplate that the Board would undertake to amend its original orders and petition this court for enforcement thereof.

The present enforcement decree of this court issued on January 14, 1950, is valid and effectual. There is no reason to clarify or supplement it in the manner proposed by the Board. Nothing would be gained thereby.

The Board concedes that in any future proceedings to adjudge respondents in contempt for violation of such a proposed amended decree, the question would still arise whether "location managers" are "supervisory employees" within the meaning of § 2(11) of the Act. For it goes without saying that Safeway could not place respondents in contempt of such amended decree by the expedient of naming any number of its employees "location managers." And it should be just as obvious that if the duties of location managers are so modified as to make them lose their status as supervisory employees under the Act, respondents would not be in contempt of the proposed amended decree. The decree of this court could not be so expanded as to proscribe demands that Safeway bargain for *non-supervisory* personnel. Such a decree could only be founded upon an entirely new Board proceeding.

Further, to modify our decree as the Board suggests would be to commit the error condemned in McComb v. Jacksonville Paper Co., 336 U.S. 187, where the Supreme Court said, at pp. 192-193, with reference to the District Court's treating a contempt proceeding as an action for broadening of the Court's previous decree:

> "The instant case is an excellent illustration of how it could operate to prevent accountability for persistent contumacy. Civil contempt is avoided today by showing that the specific plan adopted by respondents was not enjoined. Hence a new decree is entered enjoining that particular

> plan. Thereafter the defendants work out a plan that was not specifically enjoined. Immunity is once more obtained because the plan was not specifically enjoined. And so a whole series of wrongs is perpetuated and a decree of enforcement goes for naught."

As we stated in our opinion returning the case to the Board, we might have decided the contempt charge on the basis of affidavits submitted in the contempt proceeding. We might also have referred the cause to a special master. Instead we committed determination of the primary issue of fact, in the first instance, to the Board.

Such reference is not usual in a contempt proceeding. In several cases it has been said to be improper. See N.L.R.B. v. New York Merchandise Co., 2 Cir., 134 F. 2d 949; Wallace Corporation v. N.L.R.B., 4 Cir., 159 F. 2d 952; N.L.R.B. v. Bird Mach. Co., 1 Cir., 174 F. 2d 404. However, there is reason for taking such a course where, as here, the single fact question involved is one with which the Board is eminently equipped and qualified to deal. The fact question, briefly, was whether (at the time of the alleged violation of our enforcement decree) the location managers therein involved were "supervisors," despite having certain duties of food clerks. To resolve this one fact question we determined to utilize the machinery of the Board to procure a record and finding thereon.

In the New York Merchandise, Bird Mach. Co., and Wallace Corp. cases, supra, the courts took the

position that general decrees enforcing reinstatement and back pay orders of the Board were only interlocutory, and that further proceedings by the Board looking toward particularization of the decrees were necessary prior to contempt proceedings. The difference between such a proceeding and the contempt proceeding here, the primary purpose of which is not punishment but ascertainment of the effect of this court's decree upon a certain state of facts, is principally one of form and not of substance. The courts in the above-cited cases committed the question of modification of their decrees to the Board because the questions involved were such as to fall within the Board's province. The same consideration is present here. However, greater particularization of our decree would have been neither effectual nor proper in this case for the reasons pointed out above.

While we are in accord with the proposition that the Board should, as a general rule, have no part in a contempt proceeding, there should be some flexibility in the rule.[2] The findings of the Board in the supplementary proceeding before it should in any such case be accepted with caution. We do not say that

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[2]The arguments are that the courts should retain complete power over the policing of their own decrees and that reference of questions to the Board in a contempt proceeding would in effect be entrusting to the Board the enforcement of its own order. However, the power to punish remains with this court and it is not to be anticipated that this court will surrender its independence in exercising this power to the Board, even though the making of a record on the question involved and the determination thereof in the first instance is delegated to the Board. It is also suggested that this court is bound to follow the findings of the Board where sustained by substantial evidence on the whole record. But the court could not be so bound in a contempt proceeding.

the course we have taken here will or should be followed in all cases of this nature, but we see no compelling reason for vacating our order returning the cause to the Board. Accordingly, we shall proceed to consider the contempt proceeding upon its merits.

The only substantial question posed in the contempt proceeding was and is whether location managers are supervisory employees within the meaning of § 2(11) of the Act. The Board, after a hearing, has answered that question in the affirmative, with no exceptions having been taken by respondents to its finding of fact on the issue. We have examined the affidavits and the record made by the Board and are in agreement with its conclusion as to the status of location managers.

There is no question that Local and International did impose as a condition to their bargaining on behalf of clerks the bargaining by Safeway for location managers. Respondents have admitted to demanding freedom on the part of the clerks to strike if location managers are not provided for in the bargaining agreement; that persons doing the work of clerks (which would include location managers for part of their work day) should have the benefit of any collective bargaining agreement that should be entered into, or in the alternative that location managers should not do the work of clerks; and that location managers should be selected from among the clerks. And it is further admitted that respondents called a strike when its demands were not met.

It will not do to say that the demands made were solely in the interests of the clerks in the appropriate bargaining unit. The effect of our decree was to prohibit all attempts of respondents to exact concessions from Safeway as to supervisory employees as the price of reaching an agreement as to the terms and conditions of employment of clerks. We think it too plain for argument that respondents' demands flew directly in the face of this prohibition. And it is immaterial that when respondents consented to the entry of this court's decree they did not foresee that this would be its effect. A party may not voluntarily submit himself to a judgment of a court one day and flaunt it with impunity the next when its application proves more distasteful than he had anticipated. N.L.R.B. v. American Mfg. Co., 5 Cir., 132 F. 2d 740.

It is unnecessary to discuss at length the contention of respondents that the Board exceeded its authority in issuing the original order here in question and that so much of this court's decree as enforces it should be disregarded and stricken. The same contention was made when the contempt matter first came before this court and was rejected without discussion. The Board clearly had jurisdiction to investigate the unfair labor practices charged. As to the power of the Board to issue the order, the question is not, as respondents would have us believe, whether supervisory employees may be deprived of their conceded right to organize, join unions and bargain collectively through representatives of their own

choosing. Rather, the question is whether International and Local can condition their *duty* to bargain collectively for the bargaining unit which they represent,[5] as to "wages, hours and other terms and conditions of employment"[6] upon the employer's bargaining with a class *of employees outside* the unit—a class with which the employer has a right to bargain or not to bargain, as he may choose, and from which Congress designedly, and as a matter of policy, withdrew the protections of the National Labor Relations Act.[7]

The Board could well have concluded that the injection by respondents, directly or indirectly, of the interests of supervisory employees as a consideration in the negotiation for a bargaining agreement was so extraneous to the terms and conditions of employment

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[5] § 9(a) (3) of the National Labor Relations Act reads as follows:

"(3) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * * *

"(B) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a)."

[6] § 9(d) of the National Labor Relations Act reads as follows:

"(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employee to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

[7] See Texas Co. v. N.L.R.B., 9 Cir., 160 F. 2d 949, for a discussion of the rights and the status of supervisory employees under the Taft-Hartley Act.

of those within the proper bargaining unit that the demands constituted a refusal to bargain in good faith.[9] The most that can be said is that the Board erred, and that its order might have been set aside if contested in this court in the first instance. But respondents chose to consent to the entry of the decree of this court. As the Supreme Court said in United States v. Swift & Co., 286 U.S. 106, 116-117:

> "We do not turn aside to inquire whether some of these restraints * * * could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court."

And in the same case, at p. 119, it was said:

> "Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall."

Cf. the first Swift case, Swift & Co. v. United States, 276 U.S. 311; National Labor Relations Board v. American Mfg. Co., 5 Cir., 132 F. 2d 740.

We find from the record before us that respondents have violated the enforcement decree of this court

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[9] Cf. N.L.R.B. v. Dalton Telephone Co., 5 Cir., 187 F. 2d 811, cert. denied 342 U.S. 824, where it was held that an employer could not lawfully condition its signing of a contract embodying a prior consent upon the Union's registering under the law of the state, an act which was extraneous to the bargaining negotiations and which the Union, under the law, was free to do or not to do, as it wished.

of January 14, 1950, in that respondents have failed and refused to bargain collectively with Safeway for the employees in the appropriate bargaining unit, by insisting and demanding as a condition to such bargaining that Safeway bargain collectively for location managers employed by Safeway, which location managers are supervisory employees within the meaning of Section 2(11) of the Act. A decree will be entered holding International, Local and the named officials of those organizations in contempt. In this decree we shall allow respondents 60 days in which to purge themselves of their contempt by making a satisfactory showing to this court that the demands proscribed by our decree of January 14, 1950 have been withdrawn and bargaining in good faith resumed.

The petition of the Board for enforcement of the Board's amended orders and the motion of the Board for dismissal of the contempt proceeding are denied. The motions of respondents for dismissal of the contempt proceeding and for modification of this court's decree are denied.

(Endorsed:) Opinion.

Filed Mar. 31, 1953.

Paul P. O'Brien,
Clerk.

In the United States Court of Appeals
for the Ninth Circuit

(R. 91)

National Labor Relations Board,
Petitioner,
vs.
Retail Clerks International Association, A.F.L., Retail Clerks Union, Local 648, et al.,
Respondents.

No. 12,434
Jan. 14, 1950

DECREE

The National Labor Relations Board having on November 3, 1949, issued orders against the above named Respondents, pursuant to stipulations of the parties dated September 29, 1949, in Board cases numbered 20-CB-43, 20-CB-45, 20-CB-46, 20-CB-47 and 20-CB-60, in which Safeway Stores, Incorporated, hereinafter referred to as Safeway, was the charging party, and the Respondents having consented to the entry of a decree of this Court enforcing said orders, and the Board having petitioned this Court for the enforcement of its orders; upon consideration of said petition for enforcement and stipulations,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondents, Retail Clerks International, AFL, and Retail Clerks Union Local 648:

1. Shall not:

• • • • • • •

(b) Refuse to bargain collectively with Safeway for the employees in the unit described in paragraph IV of the Stipulation in Case No. 20-CB-43 by insisting or demanding as a condition to such bargaining that Safeway bargain collectively for supervisory employees of Safeway within the meaning of Section 2 (11) of the Act;

* * * * * * *

[186 F.(2d) 371] (R. 430)

In the United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Retail Clerks International Association, A.F.L., Retail Clerks Union, Local 648, et al., Respondents.	No. 12,434 Jan. 2, 1951

Upon Petition of the National Labor Relations Board to adjudge respondents in contempt.

ORDER RETURNING CAUSE FOR FURTHER PROCEEDINGS

Before: Bone, Orr and Pope, Circuit Judges.

Per Curiam:

On November 3, 1949, the above named Board made an order directing that the respondents shall not "(b) Refuse to bargain collectively with Safeway for the employees in the unit described in paragraph IV of the stipulation in case No. 20-CB-43 by insisting or demanding as a condition to such bargaining that Safeway bargain collectively for supervisory employees of Safeway within the meaning of Section 2(11) of the Act." Thereafter, upon petition to this court for a decree enforcing the order, this court entered its decree containing the same prohibitory language quoted above.

Thereafter the Board filed its petition to adjudge the respondents in civil contempt of this court's decree in that respondents refused to bargain collectively with Safeway for employees in the unit mentioned in the decree unless Safeway will agree to certain demands. These are said to be (1) that the employees shall be free to strike "in the event that Safeway shall refuse to bargain collectively with respondents for the location managers employed by Safeway"; (2) that such location managers "shall be subject to and be entitled to the benefits of any collective bargaining agreement that may be entered into," and (3) that Safeway "shall select all location managers * * * from the membership of Local 648."

A rule to show cause was issued in response to which respondents filed numerous affidavits and a motion to modify the decree by striking from the paragraph quoted above the reference to supervisory employees.

The primary question now presented to us is whether the "location managers" mentioned, are "supervisory employees" within the meaning of the decree.

The language above quoted from the Board's order, which was the language of this court's decree, was inserted in the order and the decree pursuant to a stipulation of the parties. There is therefore nothing to be found in the record to throw any light upon whether the so-called "location managers" were intended to

be within the prohibition of the Board's order referring to "supervisory employees."

While it might be possible for this court to make a finding of fact upon the basis of the showing which has been made here as to whether the location managers in question are in fact supervisory employees within the meaning of the Act, we think it inappropriate that such a determination should be made initially by this court upon a petition to adjudge in contempt. In our view this is a matter primarily for determination by the Board upon appropriate evidence to be taken by it. We think we should not be called upon to find the facts in this proceeding based, as it is, upon a stipulated decree.

Accordingly the matter is remanded to the Board to permit it, if it shall be so advised, to take testimony and to make appropriate findings as to whether the location managers should or should not be included within the prohibitory language quoted above. Should the Board undertake such further hearing and supplement its order in accordance with its findings, it will then be in a position to petition this court for a further decree of enforcement.

(Endorsed:) Per Curiam Opinion.

Filed Jan. 2, 1951.

Paul P. O'Brien,
Clerk.

United States Court of Appeals
for the Ninth Circuit

(R. 548)

National Labor Relations Board,
Petitioner,

vs.

Retail Clerks International Association, A.F.L., Retail Clerks Union, Local 648, et al.,
Respondents.

No. 12,434
Mar. 31, 1953

Upon Petition to Adjudge Respondents Retail Clerks International Association, AFL, Retail Clerks Union Local 648, James A. Suffridge, A. B. Crossler, and C. H. Jinkerson, in Contempt and Motions of Respondents to Dismiss the Petition.

DECREE

This cause came on to be heard on the 20th of June, 1950 and on the 24th day of November, 1952, on oral argument and memoranda filed by the parties; and whereas this court in that certain proceeding numbered 12,434 and entitled National Labor Relations Board, Petitioner v. Retail Clerks International Association, AFL, et al., Respondents, on the docket of this court, did, on January 14, 1950, make its order directing that Retail Clerks International Association, AFL, and Retail Clerks Union Local 648, et al.,

"1. Shall not:

(a) Refuse to bargain collectively with Safeway for the employees in the unit described in paragraph IV of the Stipulation in Case No. 20-CB-43, by insisting or demanding as a condition to such bargaining that Safeway bargain collectively for supervisory employees of Safeway within the meaing of Section 2(11) of the Act"

and the court finding that respondents have failed and refused to bargain collectively with Safeway in violation of the said order of this court, by insisting and demanding as a condition to such bargaining that Safeway bargain collectively for location managers employed by Safeway, which location managers are supervisory employees within the meaning of Section 2(11) of the Act,

It Is Hereby Ordered, Adjudged and Decreed by this court that Retail Clerks International Association, AFL, Retail Clerks Union Local 648, James A. Suffridge, A. B. Crossler, and C. H. Jinkerson, respondents, be, and hereby are, adjudged in contempt for violating said order of this court and that respondents may purge themselves of their contempt of said order by withdrawing their demands that Safeway bargain collectively for location managers as a condition to respondents' bargaining for the employees in the unit specified in the said order of this court, and by commencing to bargain collectively in good faith with Safeway for the employees in the said unit, within 60 days from the date hereof;

And Respondents Are Further Ordered to report within sixty-one (61) days herefrom what has been done with reference to its obedience to said order, the court retaining this proceeding for further action respecting respondents' contempt.

(Endorsed:) Decree.

Filed and entered March 31, 1953.
Paul P. O'Brien,
Clerk.

United States Court of Appeals
for the Ninth Circuit
(R. 726).

National Labor Relations Board, Petitioner, vs. Retail Clerks International Association, A.F.L., Retail Clerks Union, Local 648, et al., Respondents.	No. 12,434

ORDER

Re: Petition of Respondents for a Rehearing Before: Bone, Orr and Pope, Circuit Judges.

Rehearing granted.

The rehearing shall be limited to the questions whether the following demands, made by respondents subsequent to the enforcement decree of this Court of January 14, 1950, and in the course of negotiation for a bargaining contract covering the employees in the bargaining unit described in paragraph IV of the stipulation in case No. 20-CB-43, constitute violations of the said decree of this Court:

1. The demand that a no-strike clause be eliminated from the proposed bargaining contract.

2. The demand that no location manager shall perform the same work as that performed by the employees in the above-stated bargaining unit, sometimes called "clerks' work," under terms and condi-

tions of employment less favorable than those provided in a bargaining contract covering those within the said unit; or, in the alternative, that no location manager shall perform "clerks' work."

3. The demand that location managers shall be selected from among the employees in the said bargaining unit.

The questions whether the above-entitled demands were in fact made, and whether location managers are supervisory employees within the meaning of this Court's enforcement decree of January 14, 1950, will not be considered on rehearing.

/s/ Homer T. Bone
/s/ Wm. E. Orr
/s/ Walter L. Pope
United States Circuit Judges.

Endorsed: Filed, August 13, 1953.

Paul P. O'Brien,
Clerk.

(R. 745).

At a Stated Term, to wit: The October Term, 1953, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the second day of April, in the year of our Lord one thousand nine hundred and fifty-four.

National Labor Relations Board,
Petitioner,
vs.
Retail Clerks International Association, A.F.L., Retail Clerks Union, Local 648, et al.,
Respondents.
No. 12,434

ORDER ADJUDGING RESPONDENTS IN CONTEMPT AND DIRECTING STEPS TO BE TAKEN TO PURGE SUCH CONTEMPT

Before: Bone, Orr and Pope, Circuit Judges.

Pursuant to the opinion this day rendered and filed, It Is Ordered that the respondents herein be and they hereby are adjudged in contempt of court for having failed and refused to obey the decree of this court entered on January 14, 1950, and

It Is Further Ordered that respondents purge themselves of the civil contempt by taking the following steps:

"Make a satisfactory showing to this court that the demands which we have held to constitute a violation of the decree of this court of January 14, 1930, have been withdrawn.

"It Is Further Ordered that upon receipt of such showing, or upon expiration of the time granted therefor, the court will enter such further order as may then be appropriate."

Endorsed: Filed and entered, April 3, 1934.

Paul P. O'Brien,
Clerk.

Appendix B

PERTINENT STATUTES.

National Labor Relations Act (49 Stat. 449, 1935, 29 U.S.C. Sections 151 et seq., as amended by 61 Stat. 136, 1947, 29 U.S.C. (Supp.) Sections 151 et seq.)

Section 2, (29 U.S.C., Supp., Section 152) Definitions.

"When used in this Act—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

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"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall,

promote, discharge, assign, reward, or discipline other employees or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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Section 8 (29 U.S.C., Supp., Section 158) Unfair Labor Practices—

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a);

* * * * * * *

"(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *"

Section 9(a) (29 U.S.C., Supp., Section 159) Representatives and Elections—

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

Section 14(a) (29 U.S.C., Supp., Section 164)

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

LEGISLATIVE HISTORY.

Legislative History of the Labor Management Relations Act, 1947, published by the N.L.R.B., U. S. Government Printing Office, 1948.

"(B) The next significant change in Section 2(3) concerns 'supervisors.' The bill, by excluding foremen and other supervisory personnel from the definition of 'employee,' deprives the Board of jurisdiction over them.

"The evidence before the committee showed this to be one of the most important and most critical problems. *When Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners,' not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the act.* * * *

* * * * * * *

"So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer,' not an 'employee,' any person 'acting in the interest of an employer'; what it again made clear in taking up H. R. 2239 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may con-

tinue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." (Italics added.)

House Report No. 245 on H.R. 3020, Legislative History of the Labor Management Relations Act, 1947, Volume 1, pages 304, 308.

"SUPERVISORY PERSONNEL

"A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise. It was not until 1945, after several changes in position, that the National Labor Relations Board itself by divided vote finally decided that supervisory employees were covered by the National Labor Relations Act. This construction was recently upheld in the Supreme Court in the *Packard Motor Car case* (decided March 10, 1947). It should be noted that the majority of the Court in this case did not approve the policy of the Board's doctrine but, in the absence of any specific limitation upon the word 'employee' in the Wagner

Act, merely held that the Board had power to reach such a conclusion. This means, as Mr. Justice Douglas pointed out in his dissenting opinion—and as Board counsel conceded in argument—that unless Congress amends the act in this respect its processes can be used to unionize even vice presidents since they are not specifically exempted from the category of 'employees.'

* * * * * * *

"In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when it adopted the Case bill. By drawing a more definite line between management and labor we believe the proposed language has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of that bill. It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock case* (49 N.L.R.B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees."

Senate Report No. 105 on S. 1126, Legislative History of the Labor Management Relations Act, 1947, Volume 1, pages 409, 410, 411.

Appendix C

A review of authoritative texts and publications which discuss or collect typical clauses in labor agreements, and of the published decisions of arbitrators and of the National War Labor Board, shows that clauses in agreements applicable to nonsupervisory employees which restrict the work of supervisors or otherwise regulate the terms or conditions of their employment are a common collective bargaining practice in the United States.

CLAUSES RESTRICTING THE WORK OF SUPERVISORS.

(1) *Authoritative Textbooks.*

"In all industries unions have succeeded in affecting the job content of foremen and first line supervisors by agreements forbidding their engaging in production operations except in specified situations." Chamberlain, N. W.: *Union Challenge to Management Control*, Harpers, 1948, p. 82.

"The increasing unionization of foremen and supervisors has caused company and union negotiators to give consideration to their status in relation to that of the employees. This has given impetus to the inclusion in labor agreements, with rank-and-file employee groups, of a clause dealing with the foremen.

"Even before this interest was aroused, many unions had been bargaining to prevent foremen from performing work of the same nature as that performed by the regular employees. This

was a protective clause designed to prevent not only the reduction in number of employees but also the setting of fast paces by these supervisors. This provision appears in many agreements." Smith, Leonard: *Collective Bargaining*, Prentice Hall, Inc., 1946, pp. 181-182.

"A firm with six workers in the New York fur industry called three of them foremen: one was foreman over the cutters, one over the operators, and one over the finishers. The agreements between the firm and these three 'foremen' provided that they were to work until the shop was closed at night, and, when necessary, on Saturdays, Sundays and holidays. Obviously this was simply a device to avoid the observance of the union agreement limiting the length of the working day and the payment for overtime.

"This case illustrates why unions need to restrict foremen or employers from engaging in journeymen's work. Such prohibitions are especially numerous in industries such as building construction and the needle trades where there are numerous small contractors and manufacturers. Although the restrictions are necessary in order to enforce union standards of hours and overtime payment, they are also intended to create employment for union members (1) by preventing journeymen from being laid off and replaced by members of the firm or by foremen and (2) by preventing foremen or employers from reducing the number of jobs by speeding up the pace. Employers or foremen are most likely to do journeymen's work during a slack year or a slack season when their time is not all required for supervising the force. It is precisely at such

times, however, that unions are most anxious to prevent employers from increasing unemployment by working at the trade themselves or by having the foremen work and by speeding up the pace. The issue was very acute in many recently organized plants during the depression of 1937-38." Slichter, Sumner H.: *Union Policies and Industrial Management,* Brookings Institute, 1941, pp. 195-197.

(2) *Standard Works Collecting and Analyzing Typical Contract Provisions.*

As far back as 1942, the Bureau of Labor Statistics of the U. S. Department of Labor published a comprehensive survey of "Union Agreement Provisions" (Bulletin No. 686) which reported, even at that time, that (pp. 202-203):

"In order to maintain employment opportunities of union members and to maintain union wage-and-hour standards, many agreements limit the performance of production work by foremen and employers and regulate the number of foremen and firm members who may work. These provisions are inserted to prevent persons who are not subject to the terms of the agreement from doing work which the union believes should be done by its members. Provisions prohibiting work by foremen customarily permit such work in emergencies or for the purpose of instruction."

Commerce Clearing House, *Labor Law Reports,* states as follows:

"GENERAL

[Sec. 51,726]

"Foremen and other comparable supervisory employees are usually excluded by contract from the bargaining unit with which the contract is concerned. This is usually accomplished by excluding them from the definition of employees in the bargaining unit. * * *

"Despite the exclusion of foremen from the bargaining unit, however, and even though the employer is not required to bargain with unions of foremen, supervisory employees usually have some of their basic rights and duties described in union contracts covering the employees with whom they deal.

"*The statement of these rights and duties is for the benefit of employers and employees alike.* Employees who have, or who may in the future become foremen want to know what a foremen's rights will be in the event of reduction in force. A promotion to foreman is not always made attractive enough to compensate for a loss in security. *The unions, as a means of maintaining a high level of employment, usually insist that the foreman's duties be limited, as much as is feasible, to supervisory functions, thereby preventing his use in lieu of a workman.*

"As for the right of foremen to bargain in their own behalf, the National Labor Relations Act (as discussed in Sec. 1675 in Volume 1) affords no protection. The employer is free to bargain or to refuse to bargain and the foremen's only recourse is a test of economic strength. * * *" (Italics added.)

"WORKING FOREMEN AND EMPLOYERS

[Sec. 51,728]

"In order to maintain employment opportunities of union members and to maintain union wage and hour standards, many agreements limit the performance of production work by foremen and employers and regulate the number of foremen and firm members who may work. These provisions are inserted to prevent persons who are not subject to the terms of the agreement from doing work which the union believes should be done by its members. * * *" (Italics added.)

".02 Other Work Prohibited

"All foremen, assistant foremen, and supervisors shall act as such during the entire twenty-four (24) hour period of any day and no foreman or assistant foreman or supervisor shall perform the work of any other employee in the place of such employee during such twenty-four (24) hour period. Any exceptions to this shall be agreed upon between the Grievance Board and the Executive Shop Committee. * * *

".08 Work Permitted Only in Emergency or for Instruction Purposes

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".081 The foreman or assistant foreman may not take the place of any worker or perform any production work except in an emergency or for purposes of instruction.

* * * * * * *

".16 Several Exceptions to Non-working Status of Foremen

"Foremen and supervisors shall act in a supervisory capacity and shall not perform work so as

to replace regular workmen or operators on the job. Superintendents, foremen or other supervisors, however, will perform such work, when necessary to instruct other employees, and will perform experimental, development and other research work as may be deemed necessary by the Company.

".161. Foremen shall act in a supervisory capacity and shall not perform any work normally performed by workers under their supervision; except in an emergency or in the instruction of workers, or to assure the proper performance of work, or work of an experimental nature, or for the proper operation of equipment, or to protect Company property, and to insure the safety of employees. The Company agrees that this function shall not be abused.

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"*.20 Foremen Not to Deprive Others of Work*

"Supervisors or foremen shall not deprive regular employees, as hereinbefore defined, of available work except in emergency cases when additional men are not on the job or readily or quickly obtainable.

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"*.28 Right to Work Dependent Upon Size of Force*

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".281 No foreman in any department who supervises a total of more than five men shall take more than one hour's work per week of work that is regularly assigned to other employees in his department, unless an emergency exists or unless for the purpose of instruction.

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"*33 Production Work Requires Union Card*
"The foreman will not be allowed to perform any work on production; if he does, he will be required to join the union. * * *" *3 C.C.H. Labor Law Reports*, Secs. 53,730 and 53,730.

A standard work in the field of collective bargaining, *Collective Bargaining Negotiations and Contracts*, The Bureau of National Affairs, Inc., contains the following pertinent statements:

"Although there are few agreements covering foremen only, many contracts covering units of nonsupervisory employees contain provisions relating to foremen. Most of such provisions are intended to solve one of two issues:

"1. Protection of employment opportunities of nonsupervisory union members. This is sometimes met by placing limitations on the number of foremen who may be employed, the work they may do, and the hours they may work. Some agreements limit foremen's seniority for the same purpose. * * * (Sec. 49:1.) (Italics added.)

"LIMITATIONS ON NUMBER OF FOREMEN

"Clauses limiting the ratio of foremen to production workers are found most frequently where the typical employer has relatively few workmen.

"*One General Foreman for Each Employer*—The foreman need not belong to the union, but only those who are union members may use tools.

"Each Employer shall be entitled to one General Foreman who may or may not belong to the Union, but no non-member shall be permitted to use tools. (Contracting Painters and Decorators

of Indianapolis and Brotherhood of Painters, Decorators and Paperhangers—AFL.) * * *

"(Additional examples are then given as to other union contracts limiting the number of foremen.) (Sec. 60.13.)

"RESTRICTIONS ON PRODUCTIVE WORK BY FOREMEN

"Contracts excluding foremen from the union generally prohibit them from doing production or maintenance work except in emergencies or for purposes of instruction or research. Unions negotiating contracts covering foremen only usually seek to include a similar prohibition.

"Where the foreman is a member of the same union as production workers, however, he is often allowed to work with the employees under his supervision so long as they are few in number.

"Limitations on work of a nonsupervisory nature performed by foremen may be incorporated in the contract, not only in the union's interest, but in the company's. Under the Fair Labor Standards Act, foremen lose their claim to overtime as executives if they spend a substantial part of their work week on nonexempt work.

* * * * * * *

"*Flat Prohibition Against Production Work.*—Supervisory officials must function as such during the entire work week.

"All Foremen, Assistant Foremen and Supervisors shall act as such during the entire work week. (Toledo Pipe Threading Machine Co. and United Automobile Workers, CIO.)

"No Work Regularly Assigned to Employees—Supervisors are forbidden, under normal circumstances, from doing work usually done by employees.

"Under normal circumstances no supervisor shall perform any work customarily assigned to employees in any classification. (Pan American Refining Corp. and Oil Workers International Union, CIO.)

"Only Union Foremen May Work—In the following clauses foremen are prohibited from working unless they are members of the union.

"A member, stockholder, director, officer, foreman or principal of any employer shall not do any work which may replace a worker, nor perform any work of a fur floor worker. This shall not include foremen who are members of Local No. 3. (Fur Dressers Guild and Independent Firms and Fur and Leather Workers Union, CIO.) * * * (Italics added.)

"Special Research Work Allowed—Foremen are prohibited from doing work ordinarily performed by nonsupervisory employees.

"Foremen shall act in a supervisory capacity only and they shall not perform any work or operation performed by a regular workman or operator at any time whatsoever. Superintendents, foremen, or other supervisors will perform when necessary, all experimental, special mechanical, or other research work deemed necessary by the Company for the betterment of the product. (Vultee Aircraft, Inc., and United Automobile Workers, CIO.) * * *

"*Permissible Types of Work Listed*—The circumstances under which foremen may perform nonsupervisory work are set out in detail.

"No foreman or supervisor, who is excluded from the bargaining unit, shall perform any work or operation normally performed by a regular employee, except in an emergency or in the instruction of workers, or to assure the proper performance of work, or work of an experimental nature, or the proper operation of equipment, or to protect Company property and assure the safety of employees. (Electrical Metallurgical Co. and United Gas, Coke and Chemical Workers, CIO) * * *

"*Penalty for Violation of No-Work Clause*—Members of the firm and foremen are barred from performing any work covered by the agreement. Each violation makes the company liable to a fine equal to the minimum weekly wage of the craft involved.

"No member of any employing firm or foreman thereof, or nonunion worker employed by the firm, shall perform any work of the crafts enumerated in this Paragraph Eighteenth. For a violation of this provision, the firm shall become liable to and pay to the Union a sum equal to the minimum weekly wage scale of such craft for each violation. (Popular Priced Dress Mfrs. Group, Inc., and International Ladies Garment Workers, AFL) * * *

"*Work When Production Difficulties are Encountered*—Supervisory employees are not permitted to work except for necessary work when production difficulties are encountered on the

job, in emergencies when regular employees are not available, and in the instruction of employees.

"*Supervisory employees shall not be permitted to perform work on any hourly rated job except in the following types of situations:* (1) in emergencies, when regular employees are not immediately available; (2) in the instruction of employees; and (3) in the performance of necessary work when production difficulties are encountered on the job. (General Motors Corp. and United Automobile Workers, CIO, 1945) * * * (Italics added)

"*Salaried supervisors, over which the union shall have no jurisdiction, may not do the work within the bargaining unit except under the three following conditions:*

a—in cases of emergency, when regular employees are not available.

b—in instructing employees.

c—when unforeseen difficulties arise.

"(American Can Company and Steelworkers, CIO, agreement dated December 13, 1946) * * * (Italics added)

"*Recognition Clause as Affecting Supervisors' Work Assignments*—A recognition clause which excludes foremen from the bargaining unit of production workers is interpreted as *not* going far enough to prevent assignment of foremen to production work.

"The company recognizes the union as the exclusive bargaining agency for all employees of the company as defined below:

"The term 'employee' as used in this agreement shall not include * * * supervisors, foremen, assistant foremen * * *. (Lukens Steel Co. (Coatsville Plant) and Steelworkers, CIO)

"COMMENT: The union argued before an arbitrator that this clause should prevent management from assigning regular production work in the bargaining unit to foremen. But the arbitrator ruled that this clause was not specific enough to prohibit foremen from performing duties normally performed by members of the bargaining unit. (12 LA 584)

"In other cases, arbitrators have also refused to infer from recognition clauses that supervisors can't be assigned work within the bargaining unit. (6 LA 826, 8 LA 144)

"*On the other hand,* at least one arbitrator has ruled that the job area marked out by the contract can't be invaded by assignment of foremen to production work even where management has the right to assign and direct the work forces. (10 LA 254)"

(Sections 49:101 through 49:109.)

See also *Collective Bargaining Negotiations and Contracts,* Bureau of National Affairs, p. 15:254 of November 20, 1953.

(3) *National War Labor Board Decisions*

The National War Labor Board during the period of its existence, fully recognized the legitimacy of

the rank and file employees' interest in the extent to which foremen and supervisory personnel are permitted to do production work and in recognition thereof frequently ordered the insertion of contract clauses protecting the rank and file work. The following are illustrative:

In re Pangborn Corp., 25 War Lab. Rep. 233 (National Board), May 1, 1945, at p. 234:

> "Foremen and other supervisors shall not be permitted to do work of the sort ordinarily performed by regular workmen except in order to instruct workers or under emergency conditions."

In re Bell Aircraft Corp., 10 War Lab. Rep. 126 (National Board), July 30, 1943, at p. 130:

> "The Company agrees to furnish the union with a list of superintendents, foremen, assistant foremen and subforemen who shall act only in the capacity of supervision and do no productive work so long as their names remain on this list; provided, however, that foremen and assistant foremen and subforemen shall be permitted to work on production in certain instances for the purpose of giving instruction or performing work in an emergency; provided, however, that such work shall not be performed beyond the period of instruction or emergency."

See, also, *Roller Bearing Company of America*, 18 War Lab. Rep. 408 (National Board), July 6, 1944, at p. 409.

(4) *Private Arbitration Awards*

Disputes over the interpretation of clauses expressly or impliedly providing that work customarily

performed by members of the bargaining unit shall not be performed by supervisory employees except under certain specific circumstances, e.g., for instructional purposes or in emergencies, have been the subject of many submissions to arbitration both before and since the enactment of the Labor Management Relations Act of 1947 (Act of June 23, 1947, 61 Stat. 136). The Bureau of National Affairs publication, Labor Arbitration Reports, alone reports more than forty such cases in the period of five years, 1946 through February, 1951. These cases are reported under Guide Number 117:339. The Court's attention is particularly invited to the following:

In re American Benberg, division of Beaunit Mills, Inc., and North American Rayon Corp. and United Textile Workers of America, Watauga Rayon Workers Union, Local 2207 (AFL), 19 LA 372.

In re Corn Products Refining Co. & American Federation of Grain Millers Local 56 (AFL), 18 LA 346.

In re Merrill-Stevens Dry Dock & Repair Co. and Industrial Union of Marine and Shipbuilding Workers of America, Local 32 (CIO), 17 LA 516.

In re Hendy Machine Co. and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 398A (CIO), 13 LA 185.

A closely related contract provision, viz. a clause concerning the transfer of work out of the bargaining unit, has also frequently been the subject of arbitration. Petitioners direct the attention of the Court to the following arbitration decisions reported in Labor Arbitration Reports:

In re Lukens Steel Co. and United Steelworkers of America (CIO), 20 LA 604.

In re Cooperative Mills Inc. and General Warehousemen, Local 418, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (AFL), 20 LA 603.

In re Rock Hill Printing and Finishing Co. and Textile Workers Union of America, Local 710 (CIO), 19 LA 467.

In re Cannon Electric Co. and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 811 (CIO), 19 LA 283.

CLAUSES RELATING TO PROMOTIONS TO AND DEMOTIONS FROM SUPERVISORY POSITIONS.

Commerce Clearing House, *Labor Law Reports* states:

"PROMOTION AND DEMOTION OF FOREMEN AND THEIR RELATION TO SENIORITY

[51,732]

"In the following clauses can be noted the careful spelling out of the rights of management and employees with respect to supervisory employees who are promoted or demoted. A complete understanding must exist between the parties to the contract so that in all phases of the cycle—employee to supervisor and back to employee—the parties are completely cognizant of just where they stand and of the rights retained or lost. On

the up side of the curve there is little interest shown but when cutbacks must take place considerable interest will be aroused and careful planning will eliminate some of the hazards that may develop when seniority is involved.

"Employees who are promoted to foremen or supervisory positions and later returned to production work sometimes accumulate seniority during their foremanship. More commonly, however, foremen or supervisors, if demoted, are credited only with their accumulated seniority at the time of their promotion.

".02 Seniority Status Dependent Upon Assignment.

"An employee moved or transferred to a supervisory position in his own department or in a department servicing his regular department, shall not forfeit any of his seniority in his regular department. All such time worked in such supervisory position shall be added to his regular departmental seniority, if and when he returns to his regular department. An employee moved or transferred to a supervisory position in a department other than his own or other than one servicing his regular department, and who stays on such job over ninety (90) days, will lose his departmental seniority in his regular department.

".021 If an hourly rated employee is promoted to a supervisory position within his own department, excluding him from the coverage of this agreement, such employee shall retain his seniority in the position from which he was transferred

and may at any time be retransferred to such former job if possible and be allowed the seniority which he had at the time of the original transfer. If he accepts a salaried supervisory position outside of his department he shall lose his seniority.

".04 Seniority Merely Retained.

"Any employee who shall be made a supervisor or assistant supervisor shall not lose his or her seniority rights accumulated from the date of his or her hiring to the date he or she was made supervisor or assistant supervisor, but during his or her supervisorship or assistant supervisorship, no seniority rights shall accrue to him or her. In the event such supervisor or assistant supervisor returns to the status of an ordinary employee, he or she shall pick up the seniority credited to him or her up to the time he or she was made a supervisor or assistant supervisor, and thereafter shall be entitled to the same rights as regards cumulative seniority as any other employee.

".08 Seniority Continues to Accumulate—No Demotions for Period of Layoff.

"An employee in a classification subject to the jurisdiction of the union, who has been in the past or will be in the future promoted to assistant foreman, or any other supervisory position, and is thereafter transferred or demoted to a classification subject to the jurisdiction of the union shall accumulate seniority while working in a supervisory position and when so transferred or demoted shall commence work in a job generally similar to the one he held at the time of his

promotion with the seniority ranking he had at the time of his promotion plus the seniority accumulated while he was working in the supervisory position in conformity with the seniority rules of plants covered by this agreement. It is further understood that no temporary demotions in supervisory positions will be made during temporary lay-offs." (*5 CCH Labor Law Reports,* Sec. 51,732.)

See, also, United States Department of Labor, Statistics, Bulletin No. 686, pages 123-124.

In the *Seventeenth Annual Report of the National Labor Relations Board,* 1952, at page 159, it is stated:

"The Board made it clear that this construction of the statutory exemption of supervisors is not prejudicial to the right of the rank-and-file employees to be considered for promotion on a nondiscriminatory basis, and that an employer's refusal to promote an employee to a supervisory position because of his participation in protected activities would clearly violate Section 8(a)(3)."

CLAUSES GOVERNING HOURS AND OVERTIME PAY OF SUPERVISORS.

The necessity for a provision in a union contract, where performance of work of the bargaining unit by persons outside the bargaining unit is permitted, requiring that such work shall in no event be performed under terms and conditions less favorable than those provided for members of the unit, has been recognized in many instances. Such a provision is necessary to protect the employees from having their

position undercut by assignment of the work to persons who otherwise have no contractual right to overtime pay, night shift premiums, holiday pay or other conditions of work important to the union. In *Commerce Clearing House, Labor Law Reports* we find the following discussions:

"HOURS OF WORK FOR SUPERVISORS

[Section 51,729]

"Since overtime pay requirements applicable to other employees are not applicable to foremen, this fact is sometimes expressly stated in the contract. Such provisions are most likely to be demanded by the employer when the foremen are union members. In some contracts, however, provisions governing hours of work for foremen are incorporated for quite a different reason, especially if the foreman does the same kind of work as other employees. Although in such instances the foreman is likely to be subject to the overtime provisions of the Fair Labor Standards Act (see Sec. 25,210 in Volume 3), *the unions want it understood that if the foreman works on the job he cannot work overtime unless he receives overtime pay. This provision is designed to prevent reduction of labor costs by having foremen do overtime work in lieu of other employees.* Such provisions, however, may also except from the overtime provisions of the Act overtime work of a non-productive nature." (Italics added)

* * * * * * *

"*.04 Overtime Pay for Overtime Production Work.*

"No foreman, assistant foreman, or journeyman shall work more than eight hours in any one day

unless he receives overtime pay based on his regular rate of pay, provided this section need not apply to foremen or assistant foremen when performing a reasonable amount of non-mechanical work.

"*.08 Overtime for Supervisors Prohibited as to Production Work.*

"Employees in supervisory positions shall not work hours in excess of those provided herein if such supervisors are doing work ordinarily performed by regular employees whose hours are governed by these regulations." (5 *Labor Law Reports,* Section 51,729, C.C.H.)

REPORT OF EMERGENCY BOARD NO. 106 TO PRESIDENT, DATED MAY 15, 1954 (N.M.B. CASE A-4336, U. S. GOVERNMENT PRINTING OFFICE).

By Executive Order No. 10511, December 28, 1953 (19 F.R. 1), President Eisenhower created an Emergency Board pursuant to Section 10 of the Railway Labor Act to investigate disputes between the carriers and certain of their employees represented by 15 cooperating (non-operating) Railway Labor organizations. The Emergency Board consisted of Charles Loring of Tucson, Arizona, Chairman, Adolph E. Wenke of Lincoln, Nebraska, and Martin P. Catherwood of Ithaca, New York.

"Carriers' Proposal Number 15

"'Establish a rule or amend existing rules to recognize the rights of supervisory employees to perform the work of employees of any craft or

class, and of excepted employees to perform the work of positions covered by the agreements from which they are wholly or partially excepted.'

* * * * * * *

"The purpose of the proposed rule is to enable such Carriers to assign work of the class or craft to employees excepted therefrom.

"This proposal strikes at the very foundation of collective bargaining agreements, for if the class or craft covered by the agreements is not secure in having the right to perform the work of the Carrier which the agreement provides that they shall have, then they have little security in their employment or in the seniority which results from their performance of the work covered thereby.

"This proposal, if agreed to by the parties, could very easily result in supervisory employees being used to perform all of Carriers' work at lesser points or stations on Carriers' property.

"It could, and probably would, result in the employees of a class or craft covered by an agreement bearing all the burdens of force reduction at large centers of employment on a Carrier, where excepted employees are usually located. It may be true that some economy would result therefrom and that Carrier would benefit from a stable force of excepted employees fully employed at all times, but these results are not, in our opinion, justified if collective bargaining is to remain in full force and effect in this industry." (Official print, pp. 66, 67).

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
1. The background of the original decree	3
2. Petitioners' demands with respect to location managers after the issuance of the decree	5
3. The contempt proceedings, and the decision of the court below	7
Argument	10
Conclusion	14

CITATIONS

Cases:

National Labor Relations Board v. *Dalton Telephone Co.*, 187 F. 2d 811, certiorari denied, 342 U.S. 824	13
United States v. *Swift & Co.*, 286 U.S. 106	13

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 182

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL, RETAIL CLERKS UNION, LOCAL 648, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original order of the Board and the court's decree, which form the basis for this contempt proceeding, were entered upon consent (R. 36-41, 71-82, 91-102) and are not reported. The court's first opinion upon the Board's application for a contempt citation, remanding the case to the Board to take additional testimony and make findings

(A. 40-42)[1] is reported at 186 F. 2d 371. The Board's supplemental decision pursuant to the remand (R. 480-487) is reported at 96 NLRB 581. The court's decision holding petitioners in contempt (A. 26-37) is reported at 203 F. 2d 165. The court's order granting rehearing (A. 46-47) is unreported. The court's final opinion, adhering to the adjudication in contempt (A. 1-25), is reported at 211 F. 2d 759.

JURISDICTION

The decree of the court below (R. 745) was entered on April 2, 1954 (A. 48-49). The petition for a writ of certiorari was filed on July 1, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

Petitioners consented to a decree enjoining them from insisting, as a condition to bargaining for a contract covering clerks, that the employer also bargain for supervisory employees. Thereafter petitioners went on strike, demanding either bargaining for a contract covering supervisors or, as an "alternative," a contract precluding supervisors from performing clerks' work.

The questions presented are:

1. Whether the court below properly found that the "alternative" demand was not made in good faith, but was intended to compel the employer to bargain for a contract covering supervisors.

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[1] "A" references are to the Appendix to the Petition.

2. Whether the court below abused its discretion in declining to modify its consent decree.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the petition, pp. 50-52.

STATEMENT

1. *The background of the original decree*

From 1937 until 1948, Local 648, one of petitioners herein, had collective bargaining contracts with Safeway Stores, Incorporated (herein called "Safeway") and most of the other retail grocery store operators in San Francisco County, covering all the employees in these stores with the exception of butchers (R. 181-182). Among the employees covered by these contracts were "location managers,"[2] supervisors who were considered "employees" within the meaning of the Act prior to its amendment in August 1947, when Congress excluded "supervisors" from the category of "employee." In the summer of 1948, during the course of negotiations with Local 648 for renewal of the existing bargaining agreement, Safeway for the first time sought to have its "location managers"

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[2] There was one location manager in charge of each of Safeway's stores. He was the sole representative of management in the store and as such had supervisory powers and duties, but he also performed, along with the rank and file food clerks, many non-supervisory tasks as a routine part of his work day (R. 113-114, 165-171).

excluded from the coverage of the new agreement (Pet. 4). When Local 648 refused to assent to the exclusion of location managers from the new collective bargaining agreement, Safeway, on December 31, 1948, filed unfair labor practice charges against Local 648 and the Retail Clerks International Association, AFL, with which it was affiliated. The Board issued a complaint charging Local 648 and the International with refusing to bargain collectively, in violation of Section 8(b)(3) of the National Labor Relations Act, as amended (R. 27-33). On September 29, 1949, after the hearing on the complaint had begun, a settlement was negotiated by and between Local 648, International, Safeway, and the General Counsel for the Board (R. 36-42). As a part of this settlement, the parties entered into a stipulation which provided in part as follows:

> All employees in the grocery departments of the 71 Safeway Stores in San Francisco County, excluding location managers and any other supervisory employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Said employees are, and have been since before 1948, represented exclusively for collective bargaining by Respondent International and its agent, Respondent Local, both of whom are labor organizations within the meaning of Section 2(5) of the Act.

Pursuant to the same stipulation, the Board entered an order on November 3, 1949, and the court below, on January 14, 1950, entered a consent decree, which provided in pertinent part as follows (R. 73, 92):

> Retail Clerks International Association, AFL, and Retail Clerks Union Local 648
>
> 1. Shall not
>
> * * *
>
> (b) Refuse to bargain collectively with Safeway for the employees in the unit described in paragraph IV of the stipulation [above quoted] by insisting or demanding as a condition to such bargaining that Safeway bargain collectively for supervisory employees within the meaning of Section 2(11) of the Act.

It is this decree which forms the basis for the contempt proceeding.

> 2. *Petitioners' demands with respect to location managers after the issuance of the decree.*

In December 1949, subsequent to the Board's order and shortly before entry of the decree, petitioners entered into a contract with the Retail Grocers Association of San Francisco covering location managers as well as clerks and sought to induce Safeway to execute either this industry contract or separate contracts covering the two groups

(R. 119-120, 132, 134-135, 142, 187-190). When Safeway refused to enter into any contract covering location managers, petitioners agreed to eliminate the provision expressly providing for the compensation of location managers but insisted upon other concessions (see, *infra*, pp. 6-7) as the price therefor (R. 120-123, 190-193). Petitioners continued thereafter to insist upon these provisions, and in order to secure a contract which "would contain the provisions mentioned above as well as other benefits, the said employees went on strike against Safeway on January 16, 1950," two days after the entry of the court's decree enforcing the Board's order (R. 193).

Petitioners' demands, upon which they continued to insist and which they reasserted in a letter to Safeway on February 8, 1950 (R. 155-160, 190-192), were as follows:

> 1. That the no-strike provision of the industry contract be eliminated in "any contract which did not include all employees performing work under Local 648's jurisdiction" [including location managers] unless such a clause contained suitable guarantees protecting clerks from loss of work or "against encroachments and abuses of union conditions on the job" (R. 121-122, 126, 158-159, 181-183, 190-191);
>
> 2. That "in selecting employees to fill such vacancies [in the position of location managers] Safeway should choose from the ranks of [experienced] clerks" (R. 192);

3. (a). "[T]hat any person performing work covered by that contract [this would include location managers who have always spent a portion of each day doing clerk's work (R. 183-184)] * * * shall be entitled, when performing such work, to enjoy the hours, wages and working conditions provided by the contract" (R. 191, 199-201); or, in the alternative,

(b). That "no location manager or any person deemed to be a supervisor shall perform work covered by this contract" (R. 159, 192-193).

These three demands were stated as an alternative to Safeway's signing a contract covering both location managers and clerks (R. 155-160, 418-422).

3. *The contempt proceedings, and the decision of the court below*

On May 19, 1950, the Board petitioned the court below to adjudge petitioners in civil contempt on the ground that these bargaining demands constituted a direct violation or attempted evasion of the court's decree. Issue was joined upon the Board's motion for summary judgment on the pleadings and petitioners' motion to modify the consent decree by striking therefrom the words "by insisting or demanding as a condition to such bargaining that Safeway bargain collectively for supervisory employees of Safeway within the meaning of Section 2(11) of the Act" (R. 394, 375-376).

On January 2, 1951, the court below remanded the case to the Board to ascertain whether location managers were supervisors within the prohibitory language of the decree (A. 40-42). Pursuant to this remand, the Board, after a hearing before a trial examiner, found that location managers were supervisors within the meaning of the Act and the decree and so advised the court (R. 492, 480-484). Petitioners, in subsequent proceedings before the court, did not contest this finding.

Thereafter, on March 31, 1953, and April 2, 1954, the court below rendered its decisions adjudging petitioners in contempt of its decree. The court below found that the union demands set forth *supra,* pp. 6-7, which covered "a great range of the supervisors' employment and working conditions," not only "flew directly in the face of" the decree, but were "so impracticable and so unreasonable" that they demonstrated "a refusal to conform to the provisions of the consent decree" (A. 7, 6, 11, 12). The court further held that its decree must be interpreted, consistent with the policy of the Act to procure for the employer "the loyalty and efficiency of his supervisors and managers," to prohibit all attempts "to exact concessions from Safeway as to supervisory employees as the price of reaching an agreement as to the terms and conditions of employment of clerks," even though purportedly made solely in the interest of the clerks (A. 8, 6-7).

With specific reference to the demand that no location manager shall perform work covered by

the contract,[3] the court pointed out that in grocery stores a manager is necessarily compelled from time to time to do clerk's work, and that Safeway's competitors (who had capitulated to petitioners' demands and signed a contract with petitioners covering managers as well as clerks, *supra*, p. 5) would enjoy a competitive advantage if Safeway agreed to the demanded restriction (A. 11). The court concluded that the proposal was "no more than a demand for a most inefficient system . . . so impracticable and so unreasonable that it demonstrates a refusal to conform to the provisions of the consent decree" (A. 11-12).

In reaching its decision, the court below rejected petitioners' contention that the decree should be modified because both the Board's order and the court's decree were allegedly broader than the Act particularly since petitioners "chose to consent to the entry of the decree of [the] court" (A. 36).

Judge Bone, dissenting, took the view that the demand for a "no-clerk's work" clause was legitimate bargaining on behalf of the clerks and was not so unreasonable as to warrant the conclusion that petitioners were not urging it in good faith (A. 15-16, 17-23).

The court below ordered that petitioners purge themselves of civil contempt within 60 days by

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[3] In the petition for certiorari, petitioners continue to insist on the legitimacy of this demand, but apparently concede that they were in contempt of court with respect to the other demands listed on pp. 6-7, *supra*, all of which were held by the court below to constitute violations of the decree (A. 5, 7).

withdrawing the demands found by the court to constitute a violation of its decree (A. 12).

ARGUMENT

1. Petitioners first sought to obtain a contract covering location managers. They were enjoined by a decree to which they consented from insisting upon such a demand in their bargaining for clerks, and hence could not lawfully strike in support of such a demand. Petitioners then demanded, as an alternative to a contract covering managers, that Safeway sign a contract prohibiting managers from doing clerk's work, and they struck in support of that demand.[4] The court below found that this demand "for a most inefficient system" was "so impracticable and so unreasonable" (A. 11) that it was made not in good faith, but with the purpose of compelling Safeway to agree instead to a contract covering location managers. This finding has ample support in the record. Furthermore, it is limited to the facts of this case, is concerned solely with the application and interpretation of a consent decree, does not conflict with the holding of any other court, and presents no question of importance warranting further review.

Petitioners' own affidavit establishes that loca-

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[4] This was but one of three demands (pp. 6-7, *supra*) all of which petitioners demanded of Safeway as a single alternative to bargaining for location managers. The other two aspects of this single alternative were likewise found violative of the decree, and petitioners have not sought review of the judgment below with respect to them. See fn. 3, p. 9, *supra*.

tion managers "have traditionally and by universal method of store operation performed the same work as all other clerks . . ." (R. 183). The demand that managers do no clerk's work was tantamount to a demand that a manager be idle part of his day. It was also a demand that a manager not take care of the needs of his store as they may arise by doing the necessary tasks, which might involve work ordinarily done by clerks. Safeway's competitors were operating under no such restrictions; they had capitulated to petitioners' demands and signed a contract covering both managers and clerks. By making this demand, petitioners sought to put Safeway in the dilemma of accepting an impossible competitive situation, or bargaining for managers as the rest of the industry had done. Indeed, petitioners' admitted "purposes, aims, and objectives" include "representation of store managers" (R. 183), and they continue to represent in collective bargaining the grocery store managers in the San Francisco area. On these facts, the court below was justified in finding that the demand was not made in good faith, that petitioners knew Safeway could not accept the demand, and that the real purpose of the proposal was to compel Safeway to accept the alternative and bargain for managers. Since the court's decree enjoined petitioners from insisting that Safeway bargain for managers, the court properly concluded that petitioners, by presenting what they knew to be an illusory and unacceptable alter-

native, were in reality still insisting on bargaining for managers, and hence were violating the decree.

Contrary to petitioners' contention (Pet. 10-14, 56-70), therefore, the decision of the court below does not raise any question as to the right of unions in other industries and under other circumstances to bargain for clauses restricting the extent to which foremen would be permitted to perform rank-and-file work. In this case, the court below found as a fact that in the light of conditions peculiar to the operation of a grocery store the demand was not made in good faith.

Petitioners contend (Pet. 13-14) that Safeway "might well find it expedient" to permit its managers to do an excessive amount of clerk's work or to create additional "supervisory" jobs. But as the court below observed, "it goes without saying that Safeway could not place [petitioners] in contempt . . . by the expedient of naming any number of its employees "location managers" (A. 30); and it is equally clear that if petitioners could establish that Safeway was abusing, or threatening to abuse, the restrictions placed on petitioners by the decree, petitioners could—if the Board were to seek a contempt citation under such changed circumstances—apply to the court below for appropriate relief. Petitioners' alleged fears show, at the most, that under other circumstances the court below could find that petitioners were acting in good faith.

The cases relied on by petitioners (Pet. 17)

hold only that where one of the parties in bargaining negotiations requests bargaining over a term of employment the other party must bargain in good faith on that matter. They are not in conflict with the decision of the court below in which the court found as a fact that petitioners were not requesting the "no clerk's work" clause in good faith, but were urging it in order to compel Safeway to accept the alternative of bargaining for location managers. Having been enjoined from insisting on bargaining for supervisors, petitioners cannot evade the decree by striking for alleged "alternatives" in an effort to compel capitulation to the original demand.

2. The court below considered and denied requests for modification of its decree to which petitioners had consented (A. 26-33, 34-36). Petitioners have at no time shown any "changing circumstances" to warrant such modification. Cf. *United States* v. *Swift & Co.,* 286 U. S. 106, 114, 116-117, 119. Moreover, the decree, enjoining petioners from insisting upon bargaining for supervisors as a condition to bargaining for rank-and-file, was valid when entered and remains valid today. The decree conforms to the settled law that where a party is required by law to bargain collectively, he may not condition his performance of that duty upon other concessions. Cf. *National Labor Relations Board* v. *Dalton Telephone Co.,* 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U. S. 824.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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RETAIL CLERKS INTERNATIONAL ASSOCIATION, A.F.L., RETAIL CLERKS UNION, LOCAL 648 et al.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION.

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Table of Authorities Cited

Cases	Pages
N.L.R.B. v. American National Insurance Co., 348 U.S. 395	7, 8
N.L.R.B. v. Whittier Mills, 5 Cir., 123 F.(2d) 725	8

Statutes

National Labor Relations Act, as amended:	
Sections 2(3)	2
Section 2(11)	2
Section 14(a)	2

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The brief of the National Labor Relations Board in opposition to the petition for certiorari is a disingenuous attempt to twist and circumvent the important legal questions raised by the decision below by

the stratagem of inventing a nonexistent factual question regarding petitioners' "good faith". From such a false premise the brief proceeds to misrepresent the decision as resting entirely upon a factual finding supposedly adverse to petitioners on this question. The truth, obvious from the lower Court's opinions (A. 8-10; 16-17),[1] is that the majority embraced an erroneous interpretation of the law regarding the Act's amendments[2] as to supervisors, concluding from that error of law that any demands *relating* to or *affecting* supervisors even indirectly were unlawful *per se* under the amendments to the Act. *The majority below then accepted as true the contentions of petitioners that their demands had been pressed in good faith solely in the interests of the clerks,* but held this fact immaterial to its decision because of the majority's view that the amended Act made such demands a violation of the decree *as a matter of law* (A. 6-7).[3] In other words, the holding was that the

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[1] "A" references are to pages of the Appendix to the Petition for Writ of Certiorari.
"B" references are to pages of the Board's brief in opposition.
"P" references are to the Petition.

[2] National Labor Relations Act, as amended, Sections 2(3), 2(11), 14(a) (A. 50-52). (Herein "the Act".)

[3] After quoting the pertinent provisions of the consent decree, Judge Pope's opinion states (A. 6-7):

> "• • • The position which the unions have taken upon the rehearing of this matter discloses a misapprehension as to what the quoted paragraph says: The unions say in effect 'Our demands do not constitute bargaining by us for location managers or any effort at such bargaining but they represent bargaining solely in the interest of the clerks.' Indeed, they say, 'we are not only willing but, frankly, somewhat eager

demands *for clerks* inevitably must affect, relate to or touch upon employment conditions of supervisors, and, therefore, constituted *bargaining for* supervisors purportedly prohibited by the 1947 amendments to the Act.

Ignoring the record of this case and the holding actually made by the majority, the Board's brief bases its argument upon the repeated false assertions that petitioners went on strike "demanding either bargaining for a contract covering supervisors or, as an 'alternative,' a contract precluding supervisors from performing clerks' work."

Statements to this effect appear in the brief in a distorted version of the "Questions Presented" (B. 2) as well as in the "Statement" of the case (B. 6, 7) and in the "Argument" (B. 10, 11-12, 13). These statements are unfounded. The true facts are as stated in the petition (P. 5-6) and as found by the Court below (A. 5), that the only demands made by petitioners in the course of bargaining for a clerks' contract, and the demands for which the clerks went

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to relinquish bargaining for Safeway location managers altogether and under all circumstances.'

* * * * * * * *

"The four demands of the unions above listed require Safeway to enter into certain bargains for the supervisory employees and relating to conditons of their employment. On the face of the decree such demands are in violation of the decree. They are demands covering a great range of the supervisors' employment and working conditions. They *relate* to who may be employed as supervisors; they *relate* to the conditions under which the supervisors shall work, and they *relate* to what work the supervisors may do. *That is calling for bargaining by Safeway for its supervisory employees.*" (Italics added.)

on strike, are those recapitulated in the letter from petitioners to Safeway on February 8, 1950 (R. 155-160, 190-194), which also expressly reaffirms petitioners' purpose to consummate a contract covering the clerks only (R. 157-158). It is, therefore, a sheer fabrication to say, as does the brief in the numerous instances cited, that these demands were pressed as an "alternative" to a demand for a contract covering managers.[4]

But in the brief this fabrication serves as the fancied prop for another equally gross error and distortion of the record. This is the claim that the Court below *found* that petitioners' demands on behalf of the clerks were not made in good faith (B. 10, 11-12, 13). No such finding was made by the Court below in either of the contempt decrees (A. 43-45, 48-49) or in the opinions which accompanied them (A. 26-37, 1-25). As noted above, what the Court below actually did was to accept as true the evidence of

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[4]The only reference to "alternative" demands in the opinion of the Court below appears in a footnote, which demonstrates that the majority did not base its decision upon any question of "alternative" bargaining. It reads:

> "[5]On rehearing respondents argued that this fourth demand was put forth as a substitute for, and not as an alternative to, their third demand. We think the record shows that it was made as an alternative. *The question cannot affect the decision in the case in any event.*" (A. 5). (Italics added.)

The only other legitimate use of the word "alternative" in reference to petitioners' proposals would be to recognize, as Judge Bone did (A. 19-21), that having capitulated to Safeway's demand that the managers be excluded from collective bargaining, petitioners in discharging their obligations to the clerks were in fact left with no alternative but to make proposals which would protect the work and employment conditions of the clerks from encroachment by the managers.

petitioners' good faith but decided that this was irrelevant because petitioners' demands *per se* violated the Act and hence the consent decree. The opposition brief, however, would have this Court believe, not only that the lower Court made findings which it never made, but also that it made findings on a question which the Court itself considered irrelevant to its decision.

The brief in opposition seeks to avoid the impact of the decision below upon the lawful customs and practices of collective bargaining in the Uinted States by arguing that only circumstances "peculiar to the operation of a grocery store" (B. 12) are involved. Such was not the view of the Court below and was not the basis of its decision. The majority plainly considered that it was carrying out congressional intent regarding the effect upon the scope of bargaining in all industries of the amended Act's exclusion of supervisors—and it said so in its opinion (A. 8-10). Thus the majority stated:

> "The conduct of the unions here furnishes a fair illustration of the sort of thing Congress was trying to get away from when it made these amendments with respect to supervisors. * * * Here the union proposes to dictate, through its bargaining, what the supervisors may or may not do. Congress took note (see note 8, supra) of how some foremen had adopted a policy of refusing to enter and protect the struck plants of their employers. Here the prohibition against a supervisor doing clerk's work would, if enforced, serve to close a store up tight in case of a strike. Con-

> gress obviously did not contemplate that a union should be able to exercise that much power. In view of the legislative history of the present Act we must construe the consent decree as having been framed with a view to avoiding just this sort of encroachment upon the rights of an employer to select and control his supervisors and to obtain their loyalty and cooperation" (A. 10).[5]

The holdings of the majority quite plainly would apply with equal force to all unions in all industries in their efforts to bargain in the traditional way respecting the work of their nonsupervisory members; and the decision cannot be dismissed as merely an isolated instance of special circumstances existing in the "peculiar operation" of certain grocery stores in California.

The personal views of the majority judges regarding the feasibility of petitioners' proposals erroneously led them to conclude that these proposals so unreasonably interfered with Safeway's prerogatives as to constitute meddling in "matters properly belonging to management" and, therefore, were beyond the lawful scope of "bargaining in good faith" as defined in the Act (A. 12). As the petition demonstrates (P. 15-20), these legal conclusions of the two

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[5]After expressing his agreement with the general principle that a decree should be interpreted harmoniously with the Act, Judge Bone pointed up the fundamental error of the majority in this case when he stated in his dissenting opinion:

> "* * * That does not at all mean that this Court may range through the Act and its history, deduce the 'policy' of the Act therefrom, and then read such policy into a decree so as to give it a very different and much broader meaning than it had when entered. * * *" (A. 16).

judges in the majority violated the express prohibitions in the Act as it was construed by this Court's decision in *N.L.R.B. v. American National Insurance Co.*, 348 U.S. 395, and render the decision below in conflict with decisions of the Courts of Appeal in other circuits (P. 17). The attempt in the Board's brief to justify this invasion by the lower Court's majority of the sphere reserved to the bargaining process is but another example of the Board's effort to shunt from the field the real legal issues in this case presented in the petition. The technique of arguing the "circumstances" of the case appears to be convenient to the position in which the Board finds itself in this case,[6] but its effect is merely to compound the error of the decision below. Judging by its brief, the Board seems to be of the view that the law and petitioners' rights thereunder are unimportant and may be suspended if it or a Court considers demands as to traditional and customary subjects of bargaining to be "impracticable" or "unacceptable" in any particular case (B. 11). By em-

[6]The entire opposition brief seems dictated by a "win at any cost" attitude. This leads to a palpably prejudicial error that cannot go unmentioned. We refer to the unwarranted claim that petitioners concede that they are in contempt of the lower Court's decision because they seek review of it only as to their clerks' work demand (B. 9, note 3; 10, note 4). The facts are that the "Specifications of Error" (p. 9) assign as error the holding of the lower Court as to all "demands" made by petitioners and the petition cites authorities showing that the other demands also conform to common collective bargaining practice (A. 70-75). As noted by Judge Bone (A. 13), the clerks' work demand is the key item in the dispute. For that reason it was given a proper emphasis in the petition. Moreover, it is the lower Court's Order (A. 48) as to which review is sought and this order requires petitioners to withdraw *all* of their demands, including the demand regarding clerks' work.

bracing such a theory in this case, the Board and its counsel not only demonstrate their disregard for the sound propositions of law laid down in such decisions as *N.L.R.B. v. Whittier Mills,* 5 Cir., 123 F.(2d) 725, 728 (P. 19), and the *American National Insurance Co.* case, supra, but by this device they are enabled to avoid altogether any discussion of the law. Thus, on one of the principal questions in this case dealt with in the petition—the right of the Board or a Court to sit in judgment on the substantive merits of a bargaining demand—not one case is cited or discussed in the opposition brief.

This Court has heretofore indicated its disagreement with the view taken by the Board in this case as to its authority under the Act. Certiorari should be granted in this case to correct the departure of the Board and the lower Court from the established course of decisions. Of equal, if not paramount, importance is the need to determine the novel and fundamental question of interpretation of the amended Act raised by the decision below and vitally affecting the customary and traditional scope of lawful collective bargaining in the United States.

Dated, August 27, 1954.

Respectfully submitted,

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Motion of Safeway Stores, Incorporated, for Leave to File a Brief as Amicus Curiae in Opposition to Petition for Certiorari

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Motion of Safeway Stores, Incorporated, for Leave to File a Brief as Amicus Curiae in Opposition to Petition for Certiorari

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Safeway Stores, Incorporated, respectfully applies to this Court for leave to file a brief as amicus curiae opposing the petition for certiorari filed in the above entitled action. Safeway Stores, Incorporated, believes and so alleges that it satisfies the requirements of paragraph 3, Rule 42 of this Court's Revised Rules on the following grounds:

1. The Solicitor General of the United States has consented to the filing of a brief by Safeway as amicus curiae. Said consent is filed herewith. The petitioners refuse to consent thereto.

2. Safeway has a direct and vital interest in this case. Safeway is the party employer to the collective bargaining relationship that is involved (A. 1-4)[1]. Safeway is—as expressly recited in the decree of the Court below—the charging party before the Board (R. 91-92), and has been a party to all of the proceedings before the Board which culminated in the decree of the Court below and in the contempt proceedings here involved (R. 27-33, 71, 480-484, 492). Safeway has participated as amicus curiae throughout the contempt proceedings in the Court below (211 F.2d 760). Safeway's interest will be materially affected by any decision.

3. Certain facts and questions of law are not being presented by the parties. The petition for certiorari is directed to whether the Court of Appeals has correctly applied the National Labor Relations Act of 1947. We believe that the brief of the National Labor Relations Board in opposition demonstrates that the judgment of the Court of Appeals that the demands were not made in good faith negatives basis for review. We will make the following points in Safeway's brief showing that the judgment of the Court below should not be reviewed through the granting of the petition for a writ of certiorari.

a. This case involves no question under the Labor Act. It involves solely the interpretation of a particular consent decree and its application to a unique factual situation not likely to recur.

b. The case presented by the petition is moot and academic, and presents a question not involved on the facts in the record.

c. The petitioners' demand, on its face, violates the consent decree.

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[1] "A" references are to Appendix to the Petition.

d. The petition makes no showing warranting review of the denial by the Court of Appeals of petitioners' request for modification of the decree.

These matters are all relevant to the question as to whether certiorari should be granted; they show that there is no basis for certiorari.

We submit that argument to support the Court of Appeals' determination in this regard is relevant and necessary to the determination of whether this Court should grant or refuse to grant the petition for certiorari.

Wherefore, Safeway Stores, Incorporated, respectfully prays that this Court grant it leave to file a brief as amicus curiae in oppostion to the petition for certiorari on file in the above-entitled cause, which brief has been lodged with the clerk.

Dated: August, 1954.

Respectfully submitted,

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